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No. 345

IN THE

Supreme Court of the United States

RALPH T. HICKEY, FRANK J. GRAVES, RAYMOND J. HEIDERSCHEIDT, JOSEPH M. KEARNS and JAMES GRAVES
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Ralph T. Hickey, Frank J. Graves, Raymond J. Heiderscheidt, Joseph M. Kearns and James Graves pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

The Opinion Below

The opinion of the Court of Appeals is printed as Appendix A hereto, and is reported at 360 F.2d 127.

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1966. (Appendix B.) A petition for rehearing *en banc* was denied on May 18, 1966 (Appendix C), and the judgment became final on that date.

On June 14, 1966, this Court (per Mr. Justice Tom C. Clark), extended the time for filing this petition to and including July 15, 1966 (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Count I of the indictment charged defendants with having conspired wilfully to misapply and receive $250,000 of the funds of Concord Savings & Loan Association, representing a portion of two mortgage loans made by Concord in November, 1960. No charge was made in the indictment that the conspiracy included an agreement to conceal the misapplication or extended beyond the time the loans were disbursed in November, 1960. The proof established that the sale of Concord by defendant Hickey to defendant Frank Graves was concluded contemporaneously with disbursment of the mortgage loans in November, 1960.

The trial judge refused, on the government's objection, to permit the defense to prove that the mortgage loans had been repaid.

The trial judge instructed the jury to consider against all defendants evidence of conversations which occurred in 1961 and 1962, at which fewer than all defendants were present, in which efforts were made to alter bank records

and to persuade a witness not to cooperate with agents of the Federal Bureau of Investigation. The Court of Appeals affirmed this ruling based on its holding that the conspiracy included repayment of the loans, and continued until the loans were repaid in 1964.

This holding presents the question whether the Court of Appeals, in inferring the existence of a continuing conspiracy to repay the loans on the basis of acts of concealment which occurred after November, 1960, has decided the case in a way which conflicts with the rule announced by this Court in *Krulewitch* v. *United States,* 336 U.S. 440 (1949), *Lutwak* v. *United States,* 344 U.S. 604 (1953), and *Grunewald* v. *United States,* 353 U.S. 391 (1957), and has thereby erroneously extended for over three years the "conspiracy" exception to the hearsay rule.

This holding presents the further issue of whether the trial court adequately instructed the jury as to the rules for determining when the conspiracy ended, and the distinction between a continuing conspiracy and a subsidiary conspiracy based upon acts of concealment taking place after the central objective of the conspiracy has been achieved.

2. The Court of Appeals also approved the ruling of the trial court in admitting against all defendants evidence of conversations which occurred before the conspiracy began, on the theory that these conversations aided in understanding later events. This ruling presents the question of whether the decision of the Court of Appeals is contrary to the heretofore unanimous holding of Courts of Appeal (as well as general principles previously announced by this Court) that pre-conspiracy declarations are admissible only against those present when the declarations occurred.

3. Count 2 of the indictment charged that defendants wilfully misapplied Concord's funds in violation of 18 U.S.C. § 657 by causing Concord to make mortgage loans on inadequate security. The trial judge, however, instructed the jury that the government proved Count 2 if it showed that an officer of Concord had undisclosed interest in the loans, or the loans were made to a fictitious borrower, with the requisite intent. The Court of Appeals approved this instruction. This ruling presents the question whether the judge's instruction improperly altered the charge against defendants in violation of their Fifth Amendment right to have the prosecution begun by a grand jury indictment, contrary to the rule of *Stirone* v. *United States*, 361 U.S. 212 (1960).

4. As each government witness testified, the trial judge instructed the jury that his testimony was to be considered only against certain named defendants. At the close of the government's case in chief, the judge instructed the jury to consider all prior testimony against all defendants. The trial judge, however, refused to permit defense counsel to cross examine the witnesses whose testimony had not previously been admitted against their clients. The Court of Appeals affirmed. The question presented is whether this procedure violated defendants' constitutional right to confront and cross examine the witnesses against them, since the witnesses did not become "witnesses against" a defendant until the trial judge ruled that the testimony was admissible against that defendant.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

18 U.S.C. § 657 provides in part:

> "Whoever, being an officer, agent or employee of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . wilfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both; . . ."

18 U.S.C. § 1006 provides in part:

> "Whoever being an officer, agent or employee of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of such corporation, institution or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

The transcript of this long and complicated case consists of over 3,400 pages. The facts are stated at some length in the opinion of the Court of Appeals. We submit the following capsule summary of facts relevant to the questions raised by this petition:

The Indictment

Defendants were tried on a three-count indictment. Count II charges that defendant Hickey, an officer of Concord Savings and Loan Association ("Concord"), wilfully misapplied funds of Concord with intent to defraud, by causing Concord to disburse two mortgage loans of approximately $250,000, knowing that Concord did not receive sufficient collateral to secure the loans, in violation of 18 U.S.C. § 657, and that the other defendants aided and abetted Hickey in the commission of this crime. (A. 5-6.)

Count III charges Hickey, an officer of Concord, with unlawful receipt of the $250,000 mortgage loans with intent to defraud, in violation of 18 U.S.C. § 1006, and that the other defendants aided and abetted him in the commission of this offense. (A. 7-8.)

Count I of the indictment charges in substance that on or about January 20, 1960, and continuing to on or about the date of the return of the indictment (January, 1964), defendants conspired with each other to defraud Concord by committing the crimes alleged in Counts II and III. Fifteen overt acts are specified, the first on January 20, 1960, and the last in July, 1963. None of the overt acts charged relates to repayment of the loans, nor is there any charge in the indictment that the conspiracy included an agreement regarding repayment or concealment of the loans. (A. 3-5.)

The Transaction Involved In the Indictment

The following facts and dates are essential to an understanding of the issues discussed in this petition:

1. In late June, 1960, Frank and James Graves were introduced to Ralph Hickey, then owner of Concord Insurance Agency, and President and General Manager of the Concord Savings and Loan Association. They began negotiations for the sale of Concord by Hickey to Frank Graves for $250,000. (A. 486-8, 560-2, 666, 696-7.)

2. In September, 1960, Frank Graves and Hickey signed written contracts for the sale of Concord by Hickey to Frank Graves for $250,000. (A. 948-950.)

3. To finance this purchase, the Graves' applied at Concord for mortgage loans on two parcels of realty. The applications were made in the name of a corporation owned by Mr. Homer Fitzgerald. The mortgage loans were approved by Concord in the total amount of $350,000. (A. 41-43, 921-3.)

4. The Hickey-Frank Graves contracts were closed on November 2, 1960. The proceeds of the loans were paid by Concord at Fitzgerald's direction to the Graves', who in turn paid $250,000 to Hickey for his stock interest in the Concord Insurance Agency and for control of Concord. On the same day, the annual stockholders meeting of Concord was held, Hickey resigned from the board, and Frank Graves, Heiderscheidt and Joseph Kearns were elected directors. Frank Graves was thereupon elected by the board of directors as Secretary and Managing Officer and Heiderscheidt was elected Vice President and Treasurer. (A. 922-3, 952.)

5. Hickey took no further part in the management or control of Concord.

The foregoing is a summary of the evidence relevant to this petition as to the events which transpired from the time Hickey met Frank and James Graves until November 2, 1960, when the loan transactions were accomplished, Hickey was paid in full, and control of Concord was transferred from Hickey to Frank Graves.

Evidence Introduced By the Government As To Pre-Conspiracy Declarations

Over the repeated objections of defense counsel, the Government was permitted to introduce evidence of numerous conversations and declarations pertaining to James and Frank Graves' acquisition of Hartman Estates—one of the two parcels of realty on which Concord later made a mortgage loan—although these conversations took place prior to June, 1960, that is, before Hickey met the other defendants and they began to negotiate for the purchase and sale of the association. (*E.g.*, A. 104-7, 115-7, 972.)

The purpose and effect of this evidence was to show that the former owners of the property, Messrs. Hartman and Coquillard, were duped and defrauded by James and Frank Graves into selling.

Hickey, Heiderscheidt and Kearns did not participate in any of these conversations. However, at the close of the Government's case the trial court directed the jury to consider the evidence of these conversations as to *all* defendants. (A. 345.)

Evidence Introduced By the Government As To Post-Conspiracy Declarations

Over the repeated objections of defense counsel, the Government was permitted to introduce against *all* defendants evidence of numerous conversations and events which occurred *after* the funds were disbursed and control of Concord was transferred in November, 1960:

(i) Evidence was introduced of meetings and conversations which Frank and James Graves and Heiderscheidt had with Neal Rosenfeld of the American National Bank and Trust Company of Chicago in February, 1961, in which efforts were made to persuade Rosenfeld to remove from the bank files certain documents relating to the mortgaged property. (A. 311-320.)

Kearns and Hickey had no connection whatsoever with these conversations. The trial judge, however, directed the jury to consider this evidence as against all of the defendants.

(ii) Evidence was introduced by the Government that in February, 1962—15 months after the closing—Hickey had a chance meeting with Fitzgerald, who told Hickey that F.B.I. agents had been talking to him about the 1960 mortgage loan transaction. Soon thereafter, a meeting was held among Hickey, James Graves, Joseph Kearns and Fitzgerald, during which efforts were made to persuade Fitzgerald to resort to the Fifth Amendment and to retain a lawyer of James Graves' choosing. (A. 211-212.)

Frank Graves and Heiderscheidt were not present and had no connection with this conversation. Nevertheless, the trial judge directed the jury to consider this evidence as against all defendants.

(iii) The Government introduced evidence of three civil suits brought by Hartman and Coquillard, in which the plaintiffs claimed the defendants had obtained title to Hartman Estates by fraud and deceit. (A. 129-131, 131-132.)

Although not all of the defendants were parties to these suits, the trial judge directed the jury to consider this evidence against all of the defendants.

(iv) Fitzgerald testified he was going to file a lawsuit against James Graves to recover $50,000 he claimed James Graves had taken from him. This claim has no connection whatsoever with the instant case. The evidence tended to show that James Graves had defrauded Fitzgerald and had appropriated money not belonging to him for his own use. (A. 268-271).

Frank Graves, Kearns, Heiderscheidt, and Hickey had absolutely no connection with this transaction. The trial judge, however, directed the jury to consider this evidence as against all defendants.

(v) The Government was permitted to introduce a large number of documents relating to events which took place after November, 1960, none of which involved all of the defendants. (A. 914, 917, 919, 920, 929, 931, 954, 955.) The trial judge directed the jury to consider this evidence against all defendants.

The Government's Position and the Trial Judge's Rulings and Instructions As To the Relevancy of Repayment of the Loans and the Duration of the Conspiracy.

At the conclusion of the government's case in chief, the trial judge made the following statement to the jury (A. 345):

> "Ladies and gentlemen of the jury, I instruct you that all the evidence which you have heard and or

seen, given through the witnesses here will now be considered by you as to all of the defendants."

During the defendants' case in chief, defense counsel attempted on several occasions to establish (on the issue of defendants' intent) that the mortgage loans were repaid to Concord. However, government counsel objected that repayment of the loans was immaterial. For example, government counsel stated:

> ". . . it is immaterial whether or not the loan was paid off. . . ." (A. 585-6, 588-9; Tr. 2158-9, 2163-4.)
>
> "Whether it [the loan] was paid or not is of no materiality to these proceedings." (A. 770-771; Tr. 2723-4.)

The trial judge upheld this position, and excluded all evidence of repayment of the loans. (A. 586, 771.)

The trial judge gave no instruction to the jury concerning commencement of the conspiracy. The only instruction which the trial judge gave relating to termination of the alleged conspiracy was (A. 896-7):

> "After a conspiracy, ladies and gentlemen of the jury, has come to an end either by the accomplishment of the common design or by the parties' abandoning same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such act or making such statement."

Refusal of Right of Cross Examination.

As each witness took the stand during the government's case in chief, and sometimes during the testimony of a witness as he recounted various conversations, government counsel stated the names of the defendant or defendants as against whom the testimony was offered, whereupon

the trial judge instructed the jury to consider the testimony only as against those defendants. (A. 37, 41, 45-47, 49, 50, 59, 88, 89, 97, 101, 104, 132, 167, 176, 182, 184, 201, 203, 206, 211, 269, 276, 289, 310, 312.) The same procedure was followed as to the government's exhibits. (A. 161-3, 310.)

In many instances, cross examination was conducted only by counsel for the defendant or defendants as to whom the evidence was offered. While counsel for the other defendants were offered an opportunity to cross examine, with few exceptions they declined to do so since the evidence had not been offered or admitted as to their clients, and when cross examination was undertaken by them it was not the careful, detailed questioning which would have been conducted had the witness' testimony been admitted generally. (A. 39, 40, 42, 50, 52, 64, 71, 74, 95, 97, 100, 102, 113, 126, 128, 141, 159, 171, 172, 179, 190, 194, 195, 212, 219, 221, 224, 233, 272, 273, 283, 287, 299-301, 304, 309, 310, 319, 325, 326.)

After the last witness had testified in the government's case in chief, government counsel moved "that all of the evidence . . . . which had been in the past restricted to particular defendants, be now applied to all of the defendants in this case." (A. 326.) Defense counsel took the position that each defendant was entitled to cross examine the government's witnesses *at the time the testimony of those witnesses was offered against him.* (A. 336-339, 341, 343-345.) The trial judge ruled that the testimony of all government witnesses was admissible against all defendants, and denied defendants' request for permission to cross examine. (A. 345.)

The Instruction Relating to Misapplication.

Count 2 of the indictment charged that Hickey misapplied funds of Concord in that he caused Concord to make the mortgage loans, "well knowing that [Concord] did not receive sufficient collateral to secure the said alleged mortgage loans." (A. 6.) Nevertheless, over defense objections, the trial judge defined "misapplication" as that term is used in 18 U.S.C. § 657 as follows (A. 899):

> "Misapplication under this statute may be committed in any or all of the following ways:
>
> "One, by an officer of a savings and loan association causing a loan to be made to his own benefit and concealing his interest in the loan from the association;
>
> "Two, by an officer of a savings and loan association causing a loan to be made, knowing that the loan is insufficiently secured and concealing that fact from the association;
>
> "Three, by an officer of a savings and loan association causing a loan to be made knowingly to a fictitious borrower."

The Opinion of the Court of Appeals For The Seventh Circuit

Defendants appealed the judgments of conviction to the United States Court of Appeals for the Seventh Circuit. Insofar as pertinent here, the Court of Appeals held:

—That the trial court had not erred in admitting against all defendants evidence of conversations which occurred prior to the inception of the conspiracy in June, 1960. (App. 22-24; see pp. 23 to 25 of this petition.)

—That the conspiracy did not end until the mortgage loans were repaid; hence the trial judge did not err in admitting against all defendants evidence of conversations

which occurred after the Graves-Hickey contracts were closed and the central objective of the conspiracy had been achieved. The Court did not mention that defense proof of repayment had been excluded at the trial. The Court conceded that if the conspiracy came to an end in November, 1960 (as defendants contended), "the trial court committed prejudicial error." (App. 24-27; see pp. 15 to 22 of this petition.)

—That the trial court correctly instructed the jury with respect to the word "misapplication" under 18 U.S.C. § 657. (App. 32-35; see pp. 25 to 28 of this petition.)

—That the trial court did not err in refusing to permit defense counsel to cross examine government witnesses at the time their testimony was introduced against the respective defendants. (App. 35-36; see pp. 28 to 32 of this petition.)

REASONS FOR GRANTING THE WRIT

I.

BY INFERRING FROM ACTS OF CONCEALMENT AFTER CONTROL OF CONCORD WAS TRANSFERRED THAT THERE WAS A SUBSIDIARY CONSPIRACY TO REPAY THE LOANS, THE COURT OF APPEALS HAS RENDERED A DECISION WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AND CONTRADICTS THE POSITION OF THE GOVERNMENT AND THE TRIAL JUDGE THAT REPAYMENT OF THE LOANS WAS IRRELEVANT.

The decision of the Court of Appeals is in direct conflict with the three decisions of this Court, *viz., Grunewald* v. *United States,* 353 U.S. 391 (1957), *Lutwak* v. *United States,* 344 U.S. 604 (1953), and *Krulewitch* v. *United States,* 336 U.S. 440 (1949).

Each of those cases holds that " . . . after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." (*Grunewald* v. *United States,* 353 U.S. at 401-402.)

The Court of Appeals conceded that, "If the conspiracy ended as asserted by the defendants [in November, 1960], there would be no question, in light of the decisions re-

ferred to [*Grunewald, Lutwak,* and *Krulewitch*], that *the trial court committed prejudicial error.*" (Emphasis added.) (App. 24.)

Contrary to the unequivocal teaching of these cases, and while paying lip service to them (App. 24-25), the Court of Appeals inferred from acts of concealment after attainment of the central objective of the conspiracy (transfer of control of Concord to the Graves' and payment of the purchase price to Hickey in November, 1960) that there was a subsidiary conspiracy to conceal the misapplication.

The Court of Appeals reasoned that repayment must have been a part of the initial conspiracy, because "If the plan was to be successful, it is logical that it included some means for repayment. . . . default on these loans would have brought them into immediate question. . . ." (App. 26.) The Court of Appeals concluded that there was "ample evidence that repayment of the loans was preconceived" (App. 26), and that "A definite pattern of concealment through diversion and subterfuge was established" (App. 27). The evidence relied on by the Court consists almost exclusively of acts of concealment which occurred *after* transfer of control of Concord in November, 1960.

As a result of this ruling, the Court of Appeals has extended for over three years the "conspiracy" exception to the hearsay rule in precisely the fashion condemned in *Krulewitch* v. *United States,* 336 U.S. 440, 443-444 (1949). Here, as in *Krulewitch,* damaging evidence was admitted against all defendants, including those not present, of declarations " . . . not made in furtherance of the alleged criminal [misapplication] . . . conspiracy charged, but made in furtherance of an alleged implied but uncharged

conspiracy aimed at preventing detection and punishment, . . . " (336 U.S. at 444.)

The ruling of the Court of Appeals is especially remarkable in light of the trial court's exclusion of defense proffered proof of repayment, on the ground that *repayment of the loans was immaterial to the case!* Thus, in the trial court the government successfully urged the irrelevancy of repayment, while on appeal a supposed (but unproven) agreement to repay was used as the basis for vitiating the hearsay rule as to declarations which occurred after November, 1960.*

It may be argued that the jury was entitled to infer that repayment was part of the central object of the original conspiracy, under the concepts expressed in *Grunewald* v. *United States,* 353 U.S. at pages 406 to 415 (1957), and *Forman* v. *United States,* 361 U.S. 416 at pages 422 to 424 (1960). But in each of those cases, (a) the indictment expressly alleged the existence of a conspiracy to violate the income tax laws *and* to conceal the violations until the statute of limitations expired (see 353 U.S. at 394, and 361 U.S. at 420-421), and (b) new trials were ordered because the jury was instructed with regard to the erroneous "implied subsidiary conspiracy" theory, and was not adequately instructed as to the law relating to scope and duration of the original conspiratorial agreement (see 353 U.S. at 413-415, and 361 U.S. at 423-424).

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*In its opinion, the Court of Appeals makes no mention of the fact that defendants' efforts to prove repayment were precluded by the trial court on government counsel's objections, although this fact was brought forcefully to the Court's attention (defendants' opening brief, pp. 35, 40, 101-104, and reply brief, pp. 17, 32-34).

In contrast, in the case at bar:

(a) The only allegations in the indictment relating to the purpose or central object of the conspiracy concern the wilful misapplication of Concord's funds through which Hickey received $250,000 in November, 1960; nothing whatever is stated in the indictment about any continuing conspiracy or original agreement to repay the loan.

(b) At the end of the government's case in chief, the trial judge explicitly instructed the jury to consider *all* of the government's evidence against *all* defendants. (A. 345.)

(c) Proffered defense proof of repayment of the loans was rejected as irrelevant on the government's objections. (A. 585-586, 588-590, 714-716, 726-727, 743-744, 770-775.)

(d) At the conclusion of the trial, no instructions were given to the jury to enable it to assess the proof against the relevant rules of law as expounded by this Court in the cases cited above (see A. 888-907). The jury was not advised that it must first determine precisely what the conspiratorial agreement was, and it was left in the dark as to how to determine when the conspiracy came to an end. The only limitation placed on the jury's consideration of the conversations which took place after November, 1960 was the vague statement that after a conspiracy has come to an end by the accomplishment of the *common design,* evidence of declarations thereafter made by one can be considered only against the speaker (A. 896-7). This instruction was contradictory of the trial court's earlier admonition that the jury should consider all government proof against all defendants (A. 345). No distinction was drawn between the original conspiratorial agreement and acts of

concealment spontaneously undertaken to cover up a prior misapplication.*

Thus, the trial court's handling of the proof was more erroneous than that which compelled reversal in *Grunewald* (353 U.S. at 413-414):

> ". . . this charge did not adequately enlighten the jury as to what they would have to find in order to conclude that the conspiracy was still alive after October 25, 1951. For the charge as given failed completely to distinguish between concealment in order to achieve the central purpose of the conspiracy (that is, the immunization of the taxpayers from tax-evasion prosecution), and concealment intended solely to cover up an already executed crime (that is, the obtaining of the 'no prosecution' rulings). The jury was never told that these overt acts of concealment could be taken as furthering the conspiracy only if the basic criminal aim of the conspiracy was not yet attained in 1949. . . .
>
> * * *
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> "We thus find that the judge's charge left it open for the jury to convict even though they found that the acts of concealment were motivated purely by the purpose of the conspirators to cover up their already accomplished crime. And this, we think, was fatal error. . . ."

This Court has on several occasions expressed concern about the risks of unfairness in conspiracy trials, and the care which trial judges must take in instructing the jury with regard to the applicable rules of law in order to protect the right of each of the defendants. *E.g., Dennis* v. *United States,* 34 L.W. 4556, 4557 (1966) (". . . the possi-

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* The Court of Appeals did concede that "The attempts to alter trust records [February, 1961] and to keep Fitzgerald quiet [February, 1962] have an element of spontaniety about them. . . . " (App. 27.)

bility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable''); *Blumenthal* v. *United States,* 332 U.S. 539, 559-560 (1947). (''Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as impregnable as possible''); *Lutwak* v. *United States,* 344 U.S. 604, 619 (1953) (''These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. . . .''); *Krulewitch* v. *United States,* 336 U.S. 440, 444 (1949).

As long ago as 1925, the Senior Circuit Judges stated that ''the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant.'' (Report of the Attorney General of the United States for 1925, p. 4.) Other responsible commentators have voiced similar opinions.*

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* See, for example, Levie, *Hearsay and Conspiracy,* 52 Mich. L. Rev. 1159, 1167-75 (1954); Klein, *Conspiracy—The Prosecutor's Darling,* 24 Brooklyn L. Rev. 1, 7-11 (1957); *The Hearsay Exception For Co-Conspirators' Declarations,* 25 U. Chi. L. Rev. 530, 539-542 (1958); *Developments In the Law of Conspiracy,* 72 Harv. L. Rev. 920, 983-7 (1959); Stone, *Conspiracy, Concealment and the Statute of Limitations,* 70 Yale L. J. 1311, 1349-50 (1961); Goldstein, *The Krulewitch Warning: Guilt by Association,* 54 Geo. L. J. 133, 139-142, 153 (1965); Tillim, *The Dilemma In Post Conspiracy Declarations,* 12 Intramural L. Rev. of New York Univ. 106, 107-108 (1957).

The case at bar provides an apt illustration of how injustice can result when the rules are not scrupulously followed and the jury carefully instructed. For example, non-participants were charged with responsibility for conversations—which took place long after the commission of the substantive crimes charged — in which co-defendants sought to alter and destroy bank records (February, 1961), and to persuade a witness to assert the privelege against self-incrimination (February, 1962). There was no evidence concerning defendant Hickey from the time he received the purchase price in November, 1960 until his chance meeting with Fitzgerald in February, 1962. And implicit in the Court's opinion is the concession that unless the conspiracy was deemed to extend beyond 1960, there would not have been sufficient evidence to submit the conspiracy count to the jury against the defendant Kearns (the only count he was convicted on) (App. 20).

The importance of strict adherence to the principles announced by this Court in *Krulewitch, Lutwak* and *Grunewald* is all the more important today because of the extensive use of conspiracy indictments being made by federal prosecutors throughout the country. The conspiracy count—"that darling of the modern prosecutor's nursery"*—is almost invariably included in cases involving multiple defendants. It is apparent that at least in the

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* Judge Learned Hand in *Harrison* v. *United States*, 7 F.2d 259, 263 (2d Cir. 1925).

Seventh Circuit,* and probably in others,** the protective rules of law in this area are not being observed.

It has been six years since this Court spoke on the subject of termination of conspiracies (*Forman* v. *United States*, 361 U.S. 416 (1960)), and thirteen years since this Court considered that subject with respect to the hearsay rule (*Lutwak* v. *United States*, 344 U.S. 604 (1953)).

The exercise by this Court of its supervisory authority is clearly needed.

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* In addition to the case at bar, see *United States* v. *Baxa*, 340 F.2d 259, 261-262 (7th Cir. 1965) (statements made by one defendant at the time of his arrest admitted against all defendants); summarily reversed without argument on the Solicitor General's confession of error, 381 U.S. 353 (1965); *United States* v. *Allegretti*, 340 F.2d 254, 256 (7th Cir. 1964), *cert. denied* 381 U.S. 911 (1965), relied upon by the Court of Appeals in the case at bar (statements made by one defendant after his arrest admitted against all defendants).

** See for example, *Atkins* v. *United States*, 307 F.2d 937 (9th Cir. 1962), relied upon by the Court of Appeals in the case at bar (a threat by one defendant to a witness to a robbery after the robbery had been committed admitted against all defendants); *United States* v. *Brecher*, 242 F. 2d 642, 645 (2d Cir. 1957) (although the central object of the conspiracy had been achieved, evidence that one defendant told a co-conspirator what to say to the police admitted against a second defendant who was already in police custody); *Mount* v. *United States*, 333 F.2d 39, 44 (5th Cir. 1964), *cert. denied*, 379 U.S. 900 (statements made by several defendants while attempting to destroy counterfeit money, after the conspiracy terminated, admitted as against non-participants); *Blumenfield v. United States*, 284 F.2d 46, 56 (8th Cir. 1960), *cert. denied* 365 U.S. 812 (statements made to a co-defendant by a woman transported across state lines for purposes of prostitution, after the transportation had taken place, concerning her perjured testimony before the federal grand jury, admitted against a defendant who was not present.)

II.

IN APPROVING ADMISSION AGAINST ALL DEFENDANTS OF CONVERSATIONS WHICH OCCURRED BEFORE THE CONSPIRACY BEGAN, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH THE PRINCIPLES ANNOUNCED BY THIS COURT, AND WITH THE HOLDINGS OF OTHER COURTS OF APPEAL.

The Court of Appeals sanctioned a further breach of fundamental principles of criminal justice and the hearsay rule by approving admission against all defendants evidence of conversations which occurred *before* the conspiracy began but in which fewer than all defendants participated.

The damaging conversations which two defendants had with Messrs. Hartman and Coquillard took place before Hickey had met the other defendants. Since Hickey was the only defendant capable of violating 18 U.S.C. §§ 657 and 1006, because he was the only defendant who was then an officer of Concord, it is obvious that the conspiracy had not commenced at the time of these conversations. The Court of Appeals conceded this fact, but, with no basis in the record upon which to do so, ascribed knowledge of these conversations to the non-participating defendants (App. 22-23), and confused relevancy with admissibility against non-participants by concluding that since the pre-conspiracy conversations aided in understanding later transactions, "They were admissible against all conspira-

tors once a prima facie conspiracy was proved." (App. 23-24.)*

So far as we are able to ascertain, the question of the admission of *pre*-conspiracy declarations has never been directly addressed by this Court. However, in many cases this Court has stated that the "conspiracy" exception to the hearsay rule applies only to declarations during the existence of the conspiracy, which perforce excludes those which occurred before the conspiracy commenced.**

Except for the decision of the court below in this case, the several Courts of Appeal which have been presented with this issue uniformly hold that pre-conspiracy declarations are not admissible against non-participants. *Continental Baking Co.* v. *United States,* 281 F.2d 137, 152-153 (6th Cir. 1960); *Morrow* v. *United States,* 11 F.2d 256, 259-260 (8th Cir. 1926); *Minner* v. *United States,* 57 F.2d 506, 511 (10th Cir. 1932) ("The declarations of Norton occurred prior to the formation of the conspiracy charged and were not binding upon nor admissible against Minner"); *Taylor* v. *United States,* 260 F.2d 737, 738 (D.C. Cir. 1958). In *Collenger* v. *United States,* 50 F.2d 345 (7th

* To support its ruling, the Court cited cases in which late entrants into a conspiracy were held to adopt declarations of co-conspirators which occurred during the existence of the conspiracy (*United States* v. *Bueur,* 194 F.2d 297, 302 (7th Cir. 1952); *United States* v. *Witt,* 215 F.2d 580, 583 (2d Cir. 1954)), even though the events occurred at a time barred by the statute of limitations (*United States* v. *General Motors,* 121 F.2d 376, 408 (7th Cir. 1941), *cert. denied* 314 U.S. 618; *United States* v. *Dennis,* 183 F.2d 201 (2d Cir. 1950), aff'd, on other grounds, 341 U.S. 494). (App. 24.)

** ". . . where made in furtherance of the objectives of a *going conspiracy,* such statements are admissible as exceptions to the hearsay rule." *Krulewitch* v. *United States,* 336 U.S. 440, 443 (1949) (emphasis added); "But only those acts and declarations are admissible under this rule, which are done and made *while the conspiracy is pending,* and in furtherance of its object." *Logan* v. *United States,* 144 U.S. 263, 309 (1892) (Emphasis added).

Cir. 1931), *cert. denied* 284 U.S. 654, the court below applied the correct rule (50 F.2d at 348):

> "It is elementary that a statement of a conspirator, in order to bind the conspirator, must be a statement not made in the formation of the conspiracy, but after the conspiracy is formed, and in furtherance of its objects. . . ."

Even when the correct rules of evidence are applied, defense of an indictment for conspiracy is fraught with danger to the innocent. But when, as here, those rules are completely abandoned, the risk of injustice becomes a strong probability. We therefore respectfully request this Court to grant this petition to announce in unequivocal terms the appropriate evidentiary limitations upon pre-conspiracy declarations.

III.

THE TRIAL COURT'S INSTRUCTION AS TO THE CHARGE IN COUNT 2 EXPANDED THE INDICTMENT CONTRARY TO THE RULE OF STIRONE v. UNITED STATES, 361 U.S. 212 (1960).

Over defendants' objections, the trial court instructed the jury that they could find the defendants guilty of misapplication of Concord's funds under 18 U.S.C. § 657 (Count 2 of the indictment) if the jury found that any one of the following occurred, coupled with wilfulness and intent to defraud (A. 899):

> (a) An officer of Concord (Hickey) made a loan to his own benefit, but concealed his interest in the loan from Concord;
>
> (b) An officer of Concord (Hickey) caused a loan to be made knowing that the loan was insufficiently secured, and concealed that fact from Concord; or

(c) An officer of Concord (Hickey) knowingly caused a loan to be made to a fictitious borrower.

Defendants objected to the first and third illustrations of misapplication in this instruction on the ground that they are not charged in the indictment. (A. 885-6.) These objections were overruled. (A. 886.) The Court of Appeals upheld the instruction as given. (App. 32-35.)

A.

The Trial Court's Instruction Varied Materially From the Crime Charged In the Indictment.

This Court long ago held that "misapplication" as used in the predecessor to Section 657 (Sec. 5209 of the Revised Statutes) has no settled technical meaning. Accordingly, a defendant must be informed with some specificity *in the indictment* how the alleged misapplication was accomplished. *United States* v. *Britton*, 107 U.S. 655, 669 (1882).

In Count 2 of this indictment, it is charged that the misapplication consisted of Hickey's causing Concord to make two loans, "well knowing" that Concord "did not receive sufficient collateral to secure the said alleged mortgage loans." (A. 6.) *There is nothing in Count 2 relating to Hickey concealing his interest in the loan, or a loan to a fictitious borrower.*

Although defendants were charged in the indictment under one theory of misapplication, two additional theories of criminality were submitted to the jury in the trial court's instructions. In approving this procedure, the Court of Appeals contravened the rule that " . . . a charge in an indictment cannot be broadened [by] . . . an instruction to the jury." *United States* v. *Spector*, 326 F.2d 345, 347 (7th Cir. 1963).

The ruling of the Court of Appeals is in conflict with the principle reiterated by this Court in *Stirone* v. *United States*, 361 U.S. 212, 217, 219 (1960):

> " . . . a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.
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> * * *
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> " . . . The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the *Bain* case [*Ex parte Bain*, 121 U.S. 1 (1887)], we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. [Citing cases.]"

Similarly, in this case, the conviction of defendants may well have been based upon the uncharged illustrations of "misapplication" contained in the trial court's instructions. The Court of Appeals thus sanctioned a violation of defendants' Fifth Amendment right that the prosecution be begun by indictment.

B.

The Erroneous Instruction As To the Meaning of "Misapplication" Infected the Entire Judgment.

Government counsel used the erroneous "misapplication" instruction as the basis for his argument to the jury. (Transcript 3189-90, 3194-95, 3209-15.) He repeatedly emphasized that a conviction could be voted on Count 2 if the jury found concealment of Hickey's position or a

fictitious borrower, regardless of the adequacy of the security. Since the jury might have determined that the defendants were guilty under Count 2 because of the erroneous explanation given to them as to the meaning of Section 657, all convictions under Count 2 should be reversed. *Cf. U.S.* v. *Klock,* 210 F.2d 217, 222 (2nd Cir. 1954).

For the same reason, the convictions under Count 1, the conspiracy count, should be set aside. That count charged a conspiracy to commit the crimes involved in both Counts 2 and 3. Here again, the jury's verdict may have been grounded on the erroneous definition of "misapplication".

The confusion which the "misapplication" instruction injected into the case as to the distinctions between the crimes charged in Counts 2 and 3 requires reversal of the convictions under Count 3 as well. The instructions were confusing because the jury was told that the specific charge in Count 3 of the indictment—that Hickey participated in and benefitted from the proceeds of the loans in question—was an example of misapplication under Count 2. (Compare the instruction at A. 900 as to the elements of Count 3.)

IV.

THE REFUSAL TO PERMIT DEFENSE COUNSEL TO CROSS EXAMINE GOVERNMENT WITNESSES AT THE TIME THEIR TESTIMONY WAS ADMITTED AGAINST DEFENDANTS VIOLATED DEFENDANTS' CONSTITUTIONAL RIGHT OF CONFRONTATION OF ADVERSE WITNESSES.

THIS IS AN IMPORTANT AND NOVEL FEDERAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

Throughout the trial, as the prosecution witnesses were called, government counsel stated that the testimony was

offered only against the particular defendants involved in the conversations and transactions to which the witness proposed to testify, whereupon the trial judge directed the jury not to consider the testimony as against any other defendant.

In most instances, counsel for the defendants against whom the testimony was not offered declined to cross examine such witnesses.

At the close of the government's case, the government's motion to have all of the evidence considered against all defendants was granted. (A. 345.) Defense counsel thereupon requested an opportunity to cross examine the witnesses whose testimony had not previously been admitted against their respective clients. The trial court denied these requests. (A. 339, 343-345.)

The Court of Appeals upheld the trial court's ruling on the basis of "practical necessity" and "tradition". The Court held that counsel for defendants must cross examine each government witness at the close of his direct examination—although his testimony is not offered as to one or more of the defendants—or not at all. The Court said (App. 36):

> "In the trial of a conspiracy case, each witness is offered for a dual purpose: first, to show individual participation in the conspiracy by its various members, and second, to prove the conspiracy itself. Even though the testimony of a witness is temporarily limited to the first purpose, his testimony is nonetheless offered for the second purpose. Defendants' counsel were charged with this knowledge. They deliberately took the risk that the limitation would be removed whenever the Government made a prima facie showing of the existence of a conspiracy."

No "dual purpose" was announced or suggested at the time the government witnesses took the stand. As each witness was called, his testimony was offered as to particular defendants, and the trial judge specifically instructed the jury not to consider the testimony against the other defendants.

The constitutional right of cross examination of adverse witnesses arises at the time the witnesses' testimony is offered against the defendant, and not before. In cases involving multiple defendants, a government witness does not become a "witness against" one defendant when the witness testifies solely against a co-defendant. Until the trial judge directs that the testimony is admissible against the defendant, the testimony is irrelevant to the government's case against that defendant. For purposes of *his* case, it is as though the witness had not taken the stand. The witness becomes a "witness against" the particular defendant for the first time if and when the trial judge rules that his testimony is admissible against the particular defendant. It is at that time, and not before, that the constitutional right of confrontation and its concomitant of cross examination arises.

The contrary holding of the Court of Appeals misconstrues and dilutes the protection afforded all defendants by the Sixth Amendment, and amounts to a denial of that right.

There are several sound tactical reasons why a trial lawyer in a conspiracy case might not wish to cross examine a witness whose testimony is not then offered against his client. Most important is the reasonable fear that the cross-examiner might unwittingly elicit damaging testimony, and thus aid the government in establishing a *prima facie* case of conspiracy against his client. But when the testimony is admitted against his client, defense

counsel has the duty and, we submit, the right, to cross examine the witness if he believes his client's interests require inquiry.

To hold, as the Court of Appeals does, that in this posture, "tradition" and "practical necessity" override a defendant's right to full and complete cross examination of a witness when that witness testifies against him, further compounds the dangers of unfairness inherent in conspiracy prosecutions.

The Court of Appeals concluded that "Failure to cross examine at that time [*i.e.*, when the witnesses were originally called] was a waiver of the right to do so." (App. 36.)

It is incomprehensible how a defendant can be held to have waived his constitutional right of cross examination, when the witnesses' testimony had not even been offered against him at the time of the supposed waiver.

Further, in light of the *Krulewitch*, *Lutwak*, and *Grunewald* cases (above, pp. 15 to 22), it is unreasonable to assume that defendants' counsel deliberately took the risk that the trial court would direct the jury to consider *all* of the evidence (including pre- and post-conspiracy declarations which were neither relevant to nor in furtherance of the conspiracy) as against *all* defendants (including those who had not participated in the conversations in question).

The holding of the Court of Appeals on waiver of the constitutional right of cross examination runs directly counter to the very recent rulings of this Court in *Brookhart* v. *Janis*, 86 S. Ct. 1245 (1966), and *Pointer* v. *Texas*, 380 U.S. 400 (1965). In *Brookhart*, this Court said (86 S. Ct. at 1247):

> ". . . unless petitioner did actually waive his right to be confronted with and to cross-examine these wit-

nesses, his federally guaranteed constitutional rights have been denied. . . .

". . . There is a presumption against the waiver of constitutional rights [citing case], and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' [Citing case.]"

This novel and important constitutional question ought to be settled by this Court.

CONCLUSION

For the foregoing reasons, we respectfully pray that this Court issue its writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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July 15, 1966

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit, filed April 4, 1966:

Before SCHNACKENBERG, KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The defendants appeal from jury verdicts of guilty on one or more counts of a three-count indictment charging them with conspiracy to defraud a federally insured savings and loan association through fraudulent misapplication of its funds, 18 U.S.C. § 657,[1] and fraudulent participation in loans issued by it, 18 U.S.C. § 1006.[2] All five defendants, Ralph T. Hickey, Frank

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[1] 18 U.S.C. § 657 reads in pertinent part:

Whoever, being an officer, agent or employee of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . willfully misapplies, any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

[2] 18 U.S.C. § 1006 reads in pertinent part:

Whoever, being an officer, agent or employee of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, . . . with intent to defraud the . . . institution . . . participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

J. Graves, James Graves, Raymond J. Heiderscheidt, and Joseph M. Kearns, were found guilty of conspiracy. With two exceptions, guilty verdicts were also returned as to all defendants on the substantive counts in which Hickey was charged as a principal and the other defendants as aiders and abettors. Heiderscheidt and Kearns were found not guilty on the count charging fraudulent misapplication of funds and Kearns was acquitted on the count charging fraudulent participation in the proceeds of an association loan.

The facts are complicated. A capsule summary of the transactions which gave rise to the criminal prosecutions will be given before proceeding to a more complete recitation of the relevant evidence.

Ralph Hickey controlled and was the managing officer of Concord Savings and Loan Association, Chicago, Illinois. He caused Concord to issue two mortgage loans totalling $350,000. The proceeds of these loans were used by Frank and James Graves to acquire title to certain parcels of real estate which nominally secured the loans themselves and to purchase control of Concord from Hickey for $250,000. The transfer of control of Concord was made pursuant to a formal agreement between Hickey and Frank Graves secured by a stock escrow for which Joseph Kearns provided the stock. Frank Graves, Kearns, and Raymond Heiderscheidt became directors of Concord immediately following the transfer of control.

The detailed facts surrounding and material to those just recited began early in 1960. They will be traced chronologically for the most part, although the pattern will at times be broken for purposes of explanation.

On January 20, 1960, Ralph Hickey acquired control of Concord Savings and Loan Association through the purchase of a related insurance agency for $126,000. Before many months had passed, he began looking around for someone to buy Concord. In the late spring of 1960 Hickey quoted an asking price of $250,000 to a mortgage broker and realtor named Milton Price. Hickey told Price that if a buyer could be found he would be willing to help generate cash for the purchase by causing Concord to make mortgage loans to the prospective buyer in an amount sufficient to cover the cost of acquiring control of Concord.

At that time Price was sharing office space in the Chicago loop with Frank Graves, Graves' son James, and Graves' son-in-law Raymond Heiderscheidt.[3] Price related Hickey's proposal to James Graves and the latter relayed the information to his business associates. Interest in Hickey's offer was expressed, and sometime in July 1960 Price arranged a meeting at the Concord offices attended by all the defendants except Kearns. Precisely what agreements were reached at that meeting will perhaps never be known, but essentially the Graveses and Heiderscheidt agreed to line up property which would support an appraisal sufficient to justify a return agreement by Hickey to cause Concord to loan enough money to purchase the property arranged for and leave $250,000 for the purchase by Frank Graves of the lending institution. Further, as shown by subsequent events, it was agreed that the true identity of the borrowers and the disposition and repayment of the loans would have to be camouflaged to avoid suspicion.

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[3] The Graveses were engaged in the real estate development business under the name Real Estate Consultants, Inc.

The real estate selected by the prospective purchaser of the stock control in Concord as capable of supporting the necessary loan was variously known as the Hartman farm and Hartman Estates. The Graveses considered this property to be at their disposal for reasons which provide the first disgression from chronological sequence.

Hartman Estates was a 142-acre farm located just west of McHenry, Illinois. In December 1959, Frank Coquillard and George Hartman, Jr. each had a fifty per cent interest in the property.[4] (The farm was subject to a mortgage of about $35,000.) Concluding that this tract possessed subdivision-development possibilities, Coquillard approached James Graves and offered to dispose of his interest. Graves agreed to purchase Coquillard's half interest for $10,000 and a contract to this effect was signed. A few weeks later, Graves persuaded Coquillard and Hartman to place the farm in a trust at the La Salle National Bank, naming Coquillard and Hartman as equal beneficiaries with an equal power of direction. Thereafter, Graves induced Hartman to sign a similar trust agreement naming Frank Graves and Hartman as equal beneficiaries, but with the sole power of direction in Frank Graves. On February 4, 1960, Hartman signed various additional documents at James Graves' request. These documents included an assignment and an agreement by Hartman to sell six per cent of his beneficial interest in the Coquillard-Hartman trust to Frank Graves[5] and a contract wherein Hartman

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[4] Coquillard and Hartman each held 50% of the stock of Hartman Builders, Inc., which claimed the farm as its principal asset.

[5] Hartman received $1500 for his signature on the agreement to sell.

and Frank Graves gave each other the right of first refusal on their respective interests in the Hartman trust, based upon a September 1959 appraisal which valued the Hartman farm at $85,200.[6] Thus, in this context, the Graveses could deal with Hickey with some assurance that title to the Hartman farm could be obtained.[7]

Shortly after the Hickey-Graves-Heiderscheidt meeting in July 1960, the parties decided to view the Hartman farm. An inspection was made, but Hickey was not satisfied that the acreage would support an appraisal of the necessary magnitude. A parcel of about ten acres of vacant, unimproved land in Kane County, Illinois, known as the Schoolside subdivision, was then added as available for purposes of the loan, and Hickey was satisfied.[8] The amount of the loan required to accomplish the objectives already set forth was eventually settled at $350,000. This figure adequately assured the payment of costs, the purchase of Schoolside and the Hartman farm, and the transfer of Hickey's control of Concord.

The next step was the presentation of the proposed loans to Concord's board of directors. The presentation did not draw attention either to the true nature of the loans themselves or to the identity of the borrowers. On August 8, 1960, upon an application presented by Hickey, the Con-

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[6] This appraisal was performed by A.O.J. Baumann, Cary, Illinois.

[7] When Coquillard became aware of the machinations jeopardizing his interest in the Hartman trust, he collaborated with Hartman in a letter of protest, dated February 15, 1960, to the La Salle National Bank, as trustee, instructing it not to deal with the trust property.

[8] Schoolside was held in trust at the American National Bank.

cord board of directors, unanimously and without reservation,[9] approved loans totalling $350,000 on the Hartman and Schoolside properties to the Wood-Stream Construction Company.[10] Wood-Stream was a building development firm. It has been contacted with reference to the development of the Hartman farm and Schoolside subdivision, but it had never made application for mortgage or construction loans in connection with these properties. Thus, as of August 8, 1960, Concord had, upon Hickey's representations, authorized a loan of $350,000 to a firm which neither applied for any such loan nor had any interest in the property securing it.

Shortly after the approval of the loan, efforts to secure favorable appraisals and to make legal arrangements for the disbursement of the loan funds and transfer of control in Concord commenced. Frank and James Graves and Heiderscheidt engaged several appraisers with little success. On August 26, 1960, John Enright submitted a preliminary valuation of $70,000 on the Hartman farm and $24,000 on Schoolside. Frank Graves told him not to bother

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[9] The board of directors of Concord did Hickey's bidding. All loans were submitted by Hickey with an explanation of their character for the approval which inevitably followed.

[10] The approval appears in the minutes of the directors' meeting as follows:

> Upon a motion of D. Rappaport seconded by Fred Knez and unanimously carried that a mortgage be granted to Wood-Stream Construction Company in an amount not to exceed $350,000.00 for 18 months at 6½% interest and 4 points on property to be improved located in Schoolside Subdivision (33 lots) St. Charles, Illinois, and 188 lots and 1250 feet of commercial land located in Hartman Subdivision, McHenry, Illinois.

reducing this appraisal to writing. On August 29, 1960, George Duffy submitted a preliminary appraisal setting the value of the Hartman farm at between $155,000 and $185,000. James Graves and Heiderscheidt asked him to inflate this figure to $400,000, but Duffy refused the request as "misleading" and "unethical." Faced with such a lack of cooperation, James Graves pressed another appraiser into service. He prevailed upon M. A. Brown to appraise the Hartman farm and Schoolside as *improved* property. Brown quickly produced an appraisal of $406,500 on the Hartman farm "as developed with streets, sewer and all utilities" and an appraisal of $70,500 on Schoolside "as improved lots," listing the cost of improvements at $50,000. The Brown appraisals were given to Hickey at Concord on about September 1, 1960. Hickey, of course, knew that both the Hartman farm and Schoolside were unimproved.

Meanwhile, on August 23, 1960, all the defendants except Kearns met with Sherwin Willens, an attorney retained by Hickey, to work out legal details relating to the sale of Concord. Willens was informed that Concord proposed to loan money to the Graveses based upon the security of two parcels owned by them which had been appraised by Duffy at $600,000. Willens was also informed that $250,000 of the loan proceeds was earmarked for the purchase of Concord. Finally, Willens was told that attorney Harold Woodward[11] had been chosen to represent Frank and James Graves in the transfer of Concord. Aside from the obvious misrepresentation relating to the appraised value of the Hartman farm and Schoolside, it should be noted that Willens was not told that Concord had already approved a $350,000 loan on these properties to Wood-Stream Construction Company at Hickey's behest.

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[11] Woodward was deceased at the time of the trial.

The vehicle selected by the parties to accomplish the staggered, inconspicuous loan disbursement and transfer of Concord was a series of escrow agreements prepared by the parties' attorneys. The first escrow was set up to receive the proceeds of the loans from Concord.[12] From this escrow, the money necessary to acquire a clear title to the Hartman farm and Schoolside was to be paid. The remaining $250,000 was to be paid into a second escrow,[13] to be disbursed at the direction of attorneys Willens and Woodward to coincide with the transfer of control in Concord. The transfer of Concord, in turn, was to be effected pursuant to contracts signed by Hickey and Frank Graves on September 8, 1960. A third escrow[14] was set up as an earnest money escrow to secure the successful completion of the Hickey-Graves contracts. This last escrow provides the occasion for Kearns' entry upon the scene. Kearns deposited his stock in it as the earnest money at the request of James Graves and Heiderscheidt.[15]

One other series of transactions must be mentioned to complete a review of the facts preceding the actual disbursement of the loans from Concord. On September 1,

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[12] This escrow, No. 255516, was established at the Chicago Title and Trust Company on September 8, 1960, and was directed by attorneys Willens and Vincent Flood. Flood had been retained by the Graveses to clear title to the Hartman farm.

[13] American National Bank and Trust Company of Chicago, Escrow No. 15817, dated September 8, 1960.

[14] American National Bank and Trust Company of Chicago, Escrow No. 15816, dated September 7, 1960.

[15] The stock was to be returned when $250,000 was paid into the Hickey-Graves escrow from the escrow set up to receive the loan proceeds. The return of the stock was "guaranteed" by an assignment of the Schoolside trust (see fn. 8).

1960, pursuant to Frank Graves' exercise of his powers of direction, the La Salle National Bank, as trustee, executed a $295,000 note and mortgage to Concord on the Hartman farm,[16] and the American National Bank, as trustee, executed a $55,000 note and mortgage to Concord on Schoolside.

The net proceeds from the loans[17] were paid into the first escrow on September 29, 1960. Payments from this escrow were directed on October 6 and 7, 1960. Hartman and Coquillard were separated from their remaining interests in the Hartman farm by receipt of checks from the escrow fund for $20,586.64 and $8,800 respectively.[18] The second escrow was enriched by $250,000 in the same manner. The final step, the payment to Hickey from the second escrow, did not occur until November 2, 1960. On that date, control of Concord shifted from Hickey to Frank Graves. Frank Graves was installed as managing officer and a director, Heiderscheidt became an officer and director, and Kearns was made a director.

While this legal machinery was toying with Concord's funds, an unexpected circumstance arose. During the first few days of October 1960, independent auditors arrived at Concord for their annual inspection. In the course of

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[16] The bank executed the mortgage despite the letter of protest it had received from Hartman and Coquillard (see fn. 7).

[17] Two separate loans were actually involved, No. 4276 ($295,000) and No. 4275 ($55,000).

[18] As part of the consideration for these checks, Hartman and Coquillard withdrew their letter of protest by a letter which was dated August 25, 1960, conveniently prior to the mortgage executed on September 1, 1960. Hartman also completed an assignment of his interest in the trust to Frank Graves which was dated May 3, 1960.

this audit, a random loan-verification letter was sent to Wood-Stream Construction Company requesting confirmation of a $350,000 loan. On October 6, 1960, Wood-Stream replied that it had not applied for a loan. This response caused the auditors some consternation, and they sought further explanation from Concord. The explanation was forthcoming within a few days. It was provided by a letter from attorney Woodward, dated October 11, 1960, which found its way into the Concord files. The letter stated that the writer's unnamed clients (the Graves group) had decided to substitute Homer C. Fitzgerald and Shur Construction Company for Wood-Stream as the developers of the Hartman farm and Schoolside.[19] It noted that this decision had been reached during the week of September 26, 1960, and apologized for the delay in relaying the information. Attached to the letter was an application for a construction loan on the Hartman farm signed by Fitzgerald on behalf of Shur. This development prompted the auditors to send a second loan-verification letter to Shur Construction Company, which was returned bearing the signature of Fitzgerald. Fitzgerald's confirmation, together with the letter of substitution and the M. A. Brown appraisals, satisfied the auditors. By about October 12, 1960, they were able to conclude that Concord's files reflected a construction loan to a builder for the purpose of making the improvements called for in the accompanying appraisals.

At this point, Fitzgerald's position requires a brief clarification. Fitzgerald was an experienced real estate man and home-builder in McHenry, Illinois. He was the sole

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[19] The substitution of Shur Construction Company for Wood-Stream as the borrower is reflected in the minutes of the October 10, 1960 meeting of Concord's board of directors.

owner of Shur Construction Company, an enterprise which was experiencing some financial difficulties. In July or August 1960, Fitzgerald was contacted by Frank and James Graves and Heiderscheidt with a view toward building on the Hartman farm. Several meetings with these persons ensued, including one at which Fitzgerald met Hickey. These discussions resulted in Fitzgerald's signing a number of documents put before him, some of them in blank and many of which he did not fully understand. These documents included contracts to purchase the Hartman farm and Schoolside from their respective trusts for a combined $405,000 (dated September 9, 1960), loan applications on these properties totalling $350,000 (dated September 13, 1960), loan closing statements (dated September 29, 1960), and the auditors' loan-verification letter. In spite of this legal documentation, however, Fitzgerald did not participate in the proceeds of the $350,000 Concord loan.

Following the audit of October 1960, Concord's Hartman-Schoolside loan files underwent a number of changes. For one thing, attorney Woodward's letter of October 11, 1960 proposing the substitution of Shur for Wood-Stream was withdrawn. A somewhat similar letter, dated September 15, 1960, replaced it. This letter set the date of substitution as prior to the disbursement of the loan proceeds on September 29, 1960. It contained the added suggestion that Shur was not only negotiating for the development of the Hartman and Schoolside properties but was also considering their outright purchase from Woodward's clients, who were not identified in the letter. Secondly, the files were augmented by the appraisals of William Brinkman. Brinkman valued the Hartman farm at $399,000 and

Schoolside at $72,500. Both properties were valued as unimproved, but on an individual-lot basis.[20]

The development of Hartman Estates never got off the ground after the transfer of control of Concord on November 2, 1960. Efforts to build on the property were beset with early and continuing difficulties. McHenry County was reluctant to give Fitzgerald the necessary building permits because the water table was too high. The pendency of lawsuits filed by Hartman and Coquillard claiming fraud in the sale of their interests in the farm further complicated matters.

In February and March 1961, an organization known as Rayka Corporation undertook the development of the Hartman farm and Schoolside and the payment of the loans. Rayka had been organized in December 1960 by nominees of the Graveses, presumably to build on the land controlled by them through construction loans from Concord. Kearns became its president in June 1961. Rayka paid the interest on the Hartman and Schoolside loans and repaid the principal on the Schoolside loan during 1961. At approximately the same time as these interest payments were being made, Rayka was receiving construction loans from Concord.[21]

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[20] For example, the appraisal of the farm was based upon its division into 188 lots and 1250 feet of business frontage. The business frontage was valued at $65 per foot. 132 lots were valued at $1600, 36 were valued at $1850, and 20 "lake frontage" lots were valued at $2000 each. There was no lake on the Hartman farm.

[21] Residential development of the Schoolside property was successfully completed by Rayka through such loans.

Rayka continued to make semiannual interest payments on the Hartman loan during 1962. The principal became due in March 1963, but was not paid. On July 17, 1963, however, an agreement to extend the loan until March 1965 was entered between Concord and Rayka.[22] The September 1963 interest payment was the last of these payments made. A balance of $302,596.99 remained on the books of Concord on September 12, 1964. The loan was taken off the books when Frank Graves sold Concord to Telegraph Savings and Loan Association on the eve of trial.

Meanwhile, the Federal Bureau of Investigation commenced an investigation of Concord. A FBI agent contacted Frank Graves on February 2, 1961. A few days later, Frank and James Graves and Heiderscheidt attempted to induce a trust officer at the American National Bank to remove portions of the Schoolside file. When this effort failed, they took less drastic measures. Assignments of beneficial interests in the Schoolside trust were inserted into the file purporting to show that Shur Construction Company became the beneficial owner of the trust on September 23, 1960, prior to the Concord loan disbursement.

Roughly one year later, in February 1962, Fitzgerald had occasion to tell Hickey that a FBI agent was trying to contact him. Hickey arranged a meeting in his home on the same evening, which meeting was attended by Fitzgerald, James Graves, Kearns, and Hickey. During this conference, Graves offered Fitzgerald "all the mortgages" he wanted if he would "take" the fifth amendment.

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[22] Heiderscheidt represented Concord and Kearns acted on behalf of Rayka.

I.

The defendants in this appeal have advanced a great variety of trial errors, both substantive and procedural. With deference to the danger of oversimplification, it may be said that the principal objections concern the Government's alleged failure to prove a prima facie case of intent to defraud and the alleged admission of irrelevant and prejudicial preconspiracy and postconspiracy evidence against all the defendants. The emphasis placed by the various defendants in their attacks upon the Government's proof differs in some respects, however, and it will be necessary to treat the evidence as to certain defendants separately at times.

Count I of the indictment charged a conspiracy among the defendants to defraud Concord by having Hickey, Frank Graves, Heiderscheidt, and Kearns, who were all officers or directors of Concord at one time or another, wilfully misapply Concord's funds and wilfully share in the proceeds of Concord's mortgage loans on the Hartman farm and Schoolside. Count II charged that Hickey, aided and abetted by the other defendants, used his position as Concord's managing officer to misapply its funds by fraudulently causing the approval and disbursement of the loans knowing them to be inadequately secured. Count III charged that Hickey, as an officer of Concord, aided and abetted by the other defendants, fraudulently participated in the proceeds of the same loans to the extent of $250,000. All parties to this appeal are in agreement that conviction of the substantive crimes charged requires proof of an in-

tent to defraud. It is also agreed that such an intent may be proved by circumstantial evidence.[23]

Defendant Hickey's basic reason for his contention that the prosecution failed to prove an intent to defraud as to him is that it was not shown either that he knew the loans were inadequately secured or that he concealed such knowledge from Concord. Hickey says that, far from proving a conspiracy to defraud, the evidence merely demonstrated a good-faith, arm's-length transaction between the other defendants and him. The evidence, however, belies Hickey's present claims of ignorance and innocence.

Hickey had considerable experience in the field of real estate finance. He viewed the Hartman and Schoolside properties personally and observed their chief physical characteristics—they were vacant, unimproved acreages. Hickey put Brown's appraisals into the Concord files. He knew that these appraisals were based upon a valuation of the property as subdivided and improved. He knew that the property would be purchased with part of the loan proceeds and that $250,000 of the $350,000 would still be available for the purchase of Concord from him. Hickey argues that there was no proof that he knew about the lower appraisals given to the Graveses. Aside from the observation that his knowledge of the existence of the Duffy and Enright appraisals was a permissible in-

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[23] The defendants repeatedly refer to the Government's burden of proof in terms of demanding the exclusion of every reasonable hypothesis other than guilt. We are not unmindful of this rule, particularly as it has been applied to cases involving circumstantial evidence, but note that it is but an alternative statement of the rule that the prosecution must prove guilt beyond a reasonable doubt. *United States* v. *Wroblewski,* 105 F.2d 444, 449 (7th Cir. 1939).

ference,[24] specific knowledge of the rejected appraisals was unnecessary in view of his proven knowledge of other facts which placed the value of the property in question far below the amount of the loans.

The proof of Hickey's intent to defraud was sufficient to go to the jury. The evidence showed that all loan approvals at Concord during Hickey's administration followed directly from his submission and explanation of them to Concord's board of directors. The evidence also showed that Concord's directors approved a $350,000 construction loan to Wood-Stream on the basis of an application which never existed. Hickey knew that neither Wood-Stream nor the "substituted" borrower, Shur, was to receive the proceeds; his board of directors did not. He knew that he would receive a $250,000 share of the funds disbursed from under a stack of escrows; his board of directors did not. In his brief, Hickey states that the directors of Concord were "fully informed of the facts as [he] knew them." The record indicates that the directors of Concord were "fully informed" of the facts only as Hickey presented them.

Defendants Frank and James Graves and Heiderscheidt challenge the Government's proof of a prima facie case on somewhat different grounds. They argue that the requisite intent to defraud was not proved (1) because the Hartman-Schoolside properties did in fact adequately secure the loans and (2) because the defendants in good faith believed that they did. The evidence, however, was ample for the jury to have found that these parcels

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[24] Hickey was present when attorney Willens was falsely informed that Duffy had submitted an appraisal of $600,000 and Enright's name was mentioned.

were not of sufficient worth to secure a $350,000 land loan and that the defendants had knowledge of this fact.

The Government's proof of the value of the parcels securing the loans was based upon the appraisals and expert testimony of A.O.J. Baumann, John Enright, and George Duffy. Baumann and Enright appraised the Hartman farm at considerably less than $100,000, Duffy at between $155,000 and $185,000. Yet the farm stood alone as the security for a loan of $295,000. Enright valued Schoolside at $24,000. Yet Schoolside was used to secure a loan of $55,000. The Graveses' and Heiderscheidt's knowledge of all these facts is unquestioned. Their guilty knowledge of value is further shown by their efforts to secure appraisals of the properties as improved, their experience in the real estate market, their knowledge of the generally poor condition of the Hartman farm, and to some extent at least by the price at which Frank Graves was able to purchase the properties—a price well below even the lowest appraisals.

The defendants contend that their opinions of value merely differed from those of the witnesses produced by the Government "on the very subjective and ethereal matter of real estate valuation." To support this assertion of good faith, the defendants refer to the testimony of at least three witnesses produced by them who testified that the Hartman-Schoolside properties had a fair market value in excess of $400,000 based upon the "lot method" of valuation. The "lot method" is described by the defendants as a method of appraising vacant land which is proposed to be subdivided for residential purposes and which is located adjacent to existing residential subdivisions. The appraiser determines the number of lots which the vacant land under study will yield. He mul-

tiplies that number by the average price at which vacant lots in the adjoining subdivisions were sold after they were improved, and then deducts the estimated cost of installing the improvements made on the adjoining property. The resulting figure is the appraised valuation.[25]

Whatever its merit to builders and developers might be, the speculative and unrealistic character of "lot-method" appraisals in assessing the value of vacant land as security for mortgage loans is apparent. "Lot-method" appraisal is a reflection of a value which may be achieved at some time in the future when the land is subdivided, improved, and ready to be sold in individual residential lots. It does not reflect the present fair market value of the vacant land, that is, what it would bring if exposed for sale on the open market, with both buyer and seller acting without duress and with full knowledge of the facts. It is common knowledge that mortgage loans on real estate, to be adequately secured, must be based upon the present fair market value of the land. The loans must be granted in an amount sufficiently below fair market value to insure a recovery in the full amount of the loan should foreclosure and sale become necessary through a default in repayment. The defendants must be charged with knowledge of these basic principles.

The objection of defendant Kearns to the Government's proof of his participation in the conspiracy presents another question. Kearns does not seriously challenge the fact that his actions contributed to the accomplishment of the purposes of the alleged conspiracy. He contends, rather, that there was no proof that his efforts were

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[25] The defendants have gratuitously provided documentation of the widespread use of this method of appraisal in the Chicago area.

accompanied by knowledge of the criminal plan to which he was contributing.

Fitzgerald testified that Kearns was present when he visited the Hartman farm with Frank and James Graves and Heiderscheidt in August 1960 to discuss the development of that property.[26] This incident is relatively innocuous except insofar as it indicates Kearns' general familiarity with the farm and the designs of the Graves group toward it. Next, on September 6, 1960, Kearns placed some of his stock in escrow at the American National Bank. The stock was used as earnest money in the transfer of Concord from Hickey to Frank Graves, but the use to which the stock would be put did not appear in the escrow agreement signed by Kearns. The agreement, however, did contain an assignment of the beneficial interest in the Schoolside trust and referred to the Brown appraisal of that property. Kearns became a director of Concord when it changed hands on November 2, 1960 and continued in that capacity for approximately one year. In June 1961 he became the president of Rayka (the corporation which developed Schoolside, paid the loan from Concord thereon, and made interest payments on the Hartman loan). Kearns was present at the February 1962 meeting in Hickey's home during which Fitzgerald was urged to take the fifth amendment in connection with the FBI investigation of Concord. Finally, as president of Rayka, Kearns entered into the March 1963 extension agreement on the Hartman loan with Concord.

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[26] Fitzgerald's initial hesitancy to include Kearns as a member of this delegation must be resolved in favor of the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

This recitation of the evidence against Kearns demonstrates a progressively increasing awareness of the circumstances under which the loans on the Hartman farm and Schoolside were made and Kearns' continued cooperation with the others in spite of it. The first meeting with Fitzgerald and the escrow agreement may perhaps not be sufficient proof of Kearns' knowing contributions to the conspiracy, nor does his directorship in Concord necessarily impart any unlawful agreement with the others. But these circumstances fit into an expanding pattern of participation which culminated in Kearns' activities as the president of Rayka, activities which, the jury could find, were consistent only with an underlying agreement to assist in the perpetuation of the fraud practiced upon Concord. In view of his prior activities, it is inconceivable that Kearns did not know, at the time Rayka made interest payments and entered into an extension agreement on the Hartman loan, who the former owners of the Hartman-Schoolside properties were or what they had done with the proceeds of the loans. The only reasonable inference is that Kearns knew that the obligations which Rayka had "assumed" the duty of paying (in exchange for the opportunity of developing the properties) were the obligations incurred by the Graveses in the purchase of Concord.

A conspirator need not participate in all the activities of the conspiracy, nor is it necessary that he become a member of the conspiracy at its inception. *United States* v. *Lipsky*, 309 F.2d 521, 522 (3d Cir. 1962), *cert. denied*, 371 U.S. 953 (1963). It is only necessary that he knowingly contribute his efforts in furtherance of it. *McManaman* v. *United States*, 327 F.2d 21, 25 (10th Cir.), *cert. denied*, 377 U.S. 945 (1964). Of course, as Kearns points out, a conspiracy may not be inferred from mere

association, *Panci* v. *United States*, 256 F.2d 308, 312 (5th Cir. 1958), and the trial judge must guard against such a possibility by scrutinizing the evidence as to each defendant before submitting the case to the jury. *United States* v. *Bufalino*, 285 F.2d 408, 418 (2d Cir. 1960). But "the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others." *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947).

Defendant Kearns also contends that his conviction cannot be sustained because the jury verdict of not guilty on the substantive counts of the indictment contradicts the verdict of guilty on the conspiracy count. Kearns' entry into the conspiracy was perhaps somewhat belated, and the jury may have concluded that his contribution to the conspiracy inhered more in the perpetuation of the fraud visited upon Concord than in the mechanics of the transfer of Concord itself. We need not speculate, however, on the manner in which the jury arrived at its verdict. Inconsistent jury verdicts on separate counts are generally permissible, even though the same evidence is offered in support of each count. *United States* v. *De Lucia*, 262 F.2d 610, 616 (7th Cir. 1958), *cert. denied*, 359 U.S. 1000 (1959).

In summary, the evidence, when considered in the light most favorable to the Government, established the conspiracy charged in the indictment and the knowing participation of each defendant in it. The evidence also established the guilt of those defendants convicted of the substantive offenses charged.

II.

The next series of objections relates to the admission into evidence of preconspiracy and postconspiracy acts and declarations of various defendants.

The defendants first contend that the trial court erred in admitting evidence of the details of the acquisition of the Hartman farm by Frank and James Graves. They say that no conspiracy could have been formed until the meeting of Hickey, James and Frank Graves, and Heiderscheidt in June 1960. In spite of this, the defendants argue, the trial court admitted evidence of transactions occurring during the spring of 1960 among Frank and James Graves, Coquillard, and Hartman. These transactions, they say, were irrelevant to the crimes charged and, since they tended to show that Coquillard and Hartman were duped into giving up their interests in the farm, were highly prejudicial.

Although the negotiations for the purchase of the farm began prior to the formation of the conspiracy, they were not concluded until the conspiracy was well under way, that is, until after money was disbursed from an escrow containing the proceeds of the Concord loans on October 7, 1960. Part of this money was used to complete the acquisition. The purchase of the Hartman farm and its value were, in turn, important issues in the case. The tenuousness of the control possessed by the Graveses over the trust in which the farm was being held directly affected the security which Concord obtained by taking a mortgage on the property. An understanding of the interest which the borrowers had in the property used to secure the loans was relevant. Therefore, a disclosure of the entire series of transactions dealing with its purchase was permissible. The letter of October 7, 1960

from Hartman and Coquillard withdrawing an earlier letter of protest to the trustees of the farm, for example, had to be placed in the context in which it was written. The transactions between the Graveses and Coquillard and Hartman also bore upon the value attributed to the farm by the defendants themselves. In short, the entire history of the acquisition was woven into the conspiracy. Since the consummation of the purchase was accomplished in furtherance of the conspiracy, the events leading up to the acquisition were adopted and became part of the conspiracy. The overlapping events of early 1960 are not similar to the disjointed preconspiracy occurrences present in the cases cited by the defendants. Here, the jury could reasonably infer that all the defendants, with the possible exception of Kearns, were familiar with the problems relating to the acquisition of the farm and approved the purchase nonetheless.

Furthermore, events which occur prior to the commission of a crime are often relevant to an understanding of the nature of the crime itself. "How far back of the commission of the crime one may go is a matter of degree, and within the general control of the judge over the relevancy of the evidence." *United States* v. *Dennis*, 183 F. 2d 201, 231 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). Here we do not think that the district judge erred by admitting evidence of the continuing series of transactions relating to the purchase of the Hartman farm. The earlier negotiations merged with acts done in furtherance of the conspiracy and were relevant to an understanding of them. They were admissible against all the conspirators once a prima facie conspiracy was proved. Kearns, who may have entered the conspiracy at a later date, took the conspiracy as he found it. When he joined and actively participated in it he adopted the previous acts and declarations of his fellow conspirators.

United States v. *Bucur*, 194 F.2d 297, 302 (7th Cir. 1952). These acts became admissible against him, at least as they tended to show the nature and objectives of the conspiracy he joined. *United States* v. *Witt*, 215 F.2d 580, 583 (2d Cir. 1954); *United States* v. *General Motors Corp.*, 121 F.2d 376, 408 (7th Cir.) *cert. denied*, 314 U.S. 618 (1941).

Next the defendants contend that the district court erred in admitting evidence of events which allegedly occurred after the conspiracy ended. They correctly state the general rules that a conspiracy terminates when its central objective is achieved and that no subsidiary conspiracy to conceal the crime may be implied. Since the central objective of the conspiracy charged in this case was the fraudulent transfer of control in Concord, so the argument goes, the conspiracy ended when the transfer took place on November 2, 1960. The defendants therefore conclude that all evidence of acts and declarations occurring after that date should have been limited to the particular actors and declarants, relying upon *Grunewald* v. *United States*, 353 U.S. 391 (1957), *Lutwak* v. *United States*, 344 U.S. 604 (1953), and *Krulewitch* v. *United States*, 336 U.S. 440 (1949).

The conspiratorial period lies at the heart of the problem. If the conspiracy ended as asserted by the defendants, there would be no question, in the light of the decisions just referred to, that the trial court committed prejudicial error. A great deal of evidence concerning the post-November 1960 activities of various defendants was eventually admitted as to all of them. The formation of Rayka Corporation and its payment of interest on the loans, the efforts of Frank and James Graves and

Heiderscheidt to rearrange the trust files relating to Schoolside, and the attempts to persuade Fitzgerald not to cooperate with the FBI provide notable examples.

The Government's position, however, is that the conspiracy continued until the indictment was returned in January 1964.[27] The Government contends that this is not the ordinary case wherein concealing the accomplishment of the central objective of the conspiracy is merely incidental to the original unlawful agreement. Here, the Government argues, the conspiracy necessarily encompassed the clandestine repayment of the loans from Concord, thus distinguishing this case from the *Grunewald, Lutwak,* and *Krulewitch* decisions.

The duration of a conspiracy depends upon the facts of the particular case, that is, it depends upon the scope of the agreement entered into by its members. Generally, the conspiracy ends when its principal objective is accomplished because no agreement to retain secrecy after the achievement of the unlawful end can be shown or implied by mere "acts of covering up." Thus in *Grunewald* v. *United States, supra* at 402, the Supreme Court stated, "Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators." But the fact that the "central objective" of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy. Where there is evidence that the conspirators originally agreed to take certain steps after the principal

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[27] The indictment so charged. The first count lists overt acts in furtherance of the conspiracy as late as July 1963.

objective of the conspiracy was reached, or evidence from which such an agreement may reasonably be inferred, the conspiracy may be found to continue. *Atkins* v. *United States*, 307 F.2d 937, 940 (9th Cir. 1962); *cf.*, *United States* v. *Allegretti*, 340 F.2d 254, 256 (7th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965). The cases cited by the defendants do not hold otherwise. The crucial factor is the necessity for some showing that the later activities were part of the original plan. In this case there was such a showing.

The defendants were charged with a conspiracy to fraudulently cause the issuance of loans in order that they might shift control in a financial institution. The *modus operandi* of the conspiracy was to disguise the nature of the loans and their borrowers. If the plan was to be successful, it is logical that it included some means for repayment. Repayment was in the interest of all the participants. As the Government suggests, default on these loans would have brought them into immediate question by those whose business it is to conduct periodic examinations of the lender. The record contains ample evidence that repayment of the loans was preconceived.

The relationship of the conspirators to Fitzgerald is revealing. Fitzgerald was hamstrung by his signature on the many documents submitted to him. He was ostensibly designated as the "borrower" on the mortgage loans, but he was never led to believe that he would receive the proceeds of mortgage loans. Instead, he was led to believe that he was to be the developer of the Hartman farm through construction loans from Concord. The logical conclusion is that the combination of these construction loans and sales of the improved properties to the ultimate consumers could eventually be manipulated

to eradicate the mortgage loan debt. The formation of Rayka reflects the same sort of arrangement, in all probability to fill the void created by Fitzgerald's difficulties. Rayka attempted to repay the Schoolside and Hartman Loans by the development and sale of these properties through a program of construction loans from Concord. The conspirators knew, of course, that the new owners of Concord would be able to direct its activities in a manner consistent with such a plan.

It was reasonable to conclude, therefore, that the conspiracy was designed to and did continue after the transfer of Concord was effectuated. A definite pattern of concealment through diversion and subterfuge was established. The acts and declarations cited by the defendants as prejudicial to nonparticipants occurred during and were in furtherance of the conspiracy, and therefore were admissible as to all defendants. The attempts to alter trust records and to keep Fitzgerald quiet have an element of spontaneity about them, but in view of what has been said, they were within the conspiratorial period and were in furtherance of the conspiracy.

III.

We now address ourselves to a number of unrelated issues posited by the defendants, which must be treated separately.

The defendants contend that the trial court unduly restricted attempts to prove their good-faith belief in the value of the Hartman farm, both in the presentation of expert testimony and in the cross-examination of the Government's experts. Generally speaking, the restrictions complained of relate to the defendants' efforts to permit witnesses to testify as to the sales price of individual improved lots in subdivisions adjoining the farm.

The trial court refused to allow such testimony and also refused to allow hypothetical valuation of the farm as subdivided and improved.

The obvious trial strategy of the defendants was to justify a valuation of the farm according to the "lot method." We have already indicated that this is an unrealistic method of valuation when the purpose of the valuation is to determine the present fair market value of property to be used as collateral for a land loan. Individual lot sales, as ingredients of the "lot method," exhibit the same objectionable quality when attempted to be used as evidence of the value of comparable property. Evidence of sales of land in neighboring areas may be used as tending to prove the value of the subject land only when it is first shown that the sales were of similar property, similarly situated.[28] The trial judge must be given considerable discretion in determining whether the conditions of similarity have beeen met.[29] The de-

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[28] *United States* v. *190.71 Acres of Land*, 300 F.2d 52, 60 (7th Cir. 1962); *Fairfield Gardens, Inc.* v. *United States*, 306 F.2d 167, 172-73 (9th Cir. 1962).

[29] *Forest Preserve District* v. *Garaher*, 299 Ill. 11, 14-15 (1921), contains a discussion pertinent to the situation in the present case:

> Evidence of voluntary sales of lands in the vicinity and similarly situated is admissible in evidence to aid in estimating the value of the land . . ., but the party offering the proof must first show that the lands so sold were similar in locality and character to the land in question. . . . No positive rule can be laid down as to the degree of similarity or the nearness of time and distance required to make such sales competent as evidence, and the question must first be submitted to the trial judge and must rest largely within his discretion. . . . Evidence of sales of property which is not similar . . . can only lead to the investigation of numerous collateral issues and would certainly tend to mislead the jury.

fendants here did not satisfy the trial court either that the general physical characteristics of the adjoining subdivisions were similar or that the sales of improved lots located therein were sufficiently relevant to the acreage valuation of the farm to permit their admission. The value of the improved property adjoining the Hartman farm was relevant only insofar as its improved character affected the value of the farm as a whole. The record shows that the Government's experts all considered the farm's location near improved, subdivided property in appraising the farm itself, but did not consider the selling price of the individual improved lots to be of much assistance in this regard. Although a broad scope of exploration of land value should be permitted in a criminal case involving defense of good faith, no abuse of the trial court's discretion has been shown here.

Defendants Hickey, Frank Graves, and James Graves next argue that the district court and Government counsel hampered and belittled their defense of reliance upon the advice of counsel in the transfer of Concord. In order to avail themselves of this defense, it was necessary for the defendants to show that they had made a full disclosure to their attorneys of all the facts pertaining to the transaction. *Bisno* v. *United States*, 299 F.2d 711, 720 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962). All three defendants testified to reliance upon counsel, but none of them testified to a disclosure of many of the facts which were proved by the Government in its case-in-chief. The defendants claim that they were prevented from doing so by court and prosecution alike. The record does not support them. It shows only that the trial court, though somewhat sharply at times, sustained objections to improper questions asked by defense counsel. The record also shows that the Government's cross-examination of Frank Graves,

objected to by the defendants as argumentative and containing false assertions of fact, was properly designed to discover whether Graves had informed attorney Woodward of the manner in which the loans from Concord were being disguised. Furthermore, the defense of reliance upon counsel was materially weakened when attorney Willens, called by the defense, testified that these defendants told him appraiser Duffy had valued the Hartman farm at $600,000, an obvious and material misrepresentation.

The admissibility of the notes of an accountant under the federal business records statute, 28 U.S.C. § 1732, is the defendants' next assignment of error. Robert Squires, an accountant, participated in the audit of Concord beginning on September 30, 1960. When the loan-confirmation letter sent to Wood-Stream Construction Company elicited a negative reply, Squires returned to Concord to reexamine the files. During his reexamination, Squires made notes outlining the contents of Hartman-Schoolside loan files. The notes were used in the preparation of the audit report of the firm which employed Squires and were kept with its records. At the trial Squires had no independent recollection of the facts and the notes did not refresh his recollection. The Government then attempted to have the notes admitted as Squires' recorded past recollection. The court, however, granted a motion by the defendants to strike his testimony regarding the contents of the loan files for lack of a proper foundation. Following this rejection, the Government proceeded to lay a foundation for the admission of the notes as business records, and they were so admitted.

The damaging character of the notes lay in their reflection of the contents of Concord's Hartman-Schoolside loan files as of October 12, 1960. The files, as reflected in

Squires' notes, indicated that construction loans on the subject properties were being made to Shur Construction Company for the purpose of making the improvements listed in the Brown appraisals. Squires was also permitted to testify that he customarily included all appraisals contained in such files in his notes, and that since the Brown appraisals were the only ones mentioned in his notes, Concord's files contained no others on the date of his inspection. This testimony was significant in showing that the Brinkman appraisals, relied on by the defendants, were not in the files two weeks after the loans had been disbursed.

Section 1732 of the Judicial Code provides for the admission of a writing made as a memorandum of "any act, transaction, occurrence, or event . . . if made in regular course of any business." This section was designed to permit the admission of business memoranda which impart a circumstantial guarantee of trustworthiness. The test is one of reliability. The summary notes in the instant case, introduced by way of the foundation testimony of the impartial professional person who prepared them, meet this test.

The defendants contend that Squires' notes were not "made in [the] regular course of business" because such notes were required by his auditing firm only when loan-verification letters produced certain unfavorable responses. But the fact that such notes were taken only under certain conditions does not mean that the note-taking was not a matter of routine for the auditing firm, that is, "in [the] regular course of [its] business." Squires testified that his was the normal procedure, given a failure in loan-confirmation.

The defendants next object that the notes were inadmissible because they were "incomplete" summaries based upon the discretion of their author. Squires testified that he summarized all the documents in Concord's files which were "important" to a determination of who the borrowers were. The element of choice, in Squires' own words, related only to "minor matters such as insurance premiums and things of that nature," and in no way affected the accuracy of the information which he did summarize. We do not think that the discretion exercised by Squires, as thus admitted, destroyed the reliability of the notes.[30] The purpose of section 1732 would be defeated if, as the defendants contend, the admissibility of the "memorandum" were to depend upon whether it constitutes a precise reproduction of the "act, transaction, occurrence, or event" of which it is evidence. *Cf.*, *McDaniel* v. *United States*, 343 F.2d 785, 788-89 (5th Cir.), *cert. denied*, 382 U.S. 826 (1965); *Neely* v. *United States*, 300 F.2d 67, 74 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962).

The defendants contend that the trial court erroneously instructed the jury as to the elements necessary for a "misapplication" of funds in violation of 18 U.S.C. § 657, charged in count II of the indictment. The court instructed the jury on this count as follows:

> (1) Three essential elements are required to be proven beyond a reasonable doubt in order to establish the offense charged in Count II of the indictment:
>
> First, that the defendant was an officer, agent or employee of or was connected in any capacity

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[30] The manner in which Squires conducted his note-taking was fully explored on cross-examination.

with a savings and loan association, the accounts of which were insured by the Federal Savings & Loan Insurance Corporation;

Second, that while being so connected with the association, he misapplied moneys or funds belonging to or entrusted to the care of the association;

Third, that the defendant did such act knowingly, wilfully, and with the intent to injure or defraud the association.

(2) The term, ladies and gentlemen of the jury, "misapplication" as used in this statute means the unlawful taking or conversion by a person to his own use or the use of someone else of the money and funds of a savings and loan association.

(3) Misapplication under this statute may be committed in any or all of the following ways: 1, by an officer of a savings and loan association causing a loan to be made to his own benefit and concealing his interest in the loan from the association; 2, by an officer of a savings and loan association causing a loan to be made, knowing that the loan is insufficiently secured and concealing that fact from the association; 3, by an officer of a savings and loan association causing a loan to be made knowingly to a fictitious borrower.

(4) If an intent to injure or defraud a savings and loan association when the loan is made is shown, it matters not whether the association will lose any part of the loan. It is the unlawful intent to injure or defraud that is the essence of this offense.

The defendants challenge part (3) of the instruction. Their position is that it purports to render the adequacy of the lending institution's security immaterial if either of the other stated conditions obtains. They say that section 657 does not prohibit surreptitious loans to officers of an insured institution or prohibit an officer from causing such an institution to make loans to a fictitious borrower. The defendants argue that the instruction thus varied materially from the crime charged and rendered count II duplicative of count III, which charged fraudulent participation in the loan proceeds in violation of 18 U.S.C. § 1006.

We do not agree with the defendants' contentions. In the circumstances of this case fraudulent "misapplication" could be committed either by an officer causing a loan to be made to a fictitious borrower or by an officer causing a loan to be made to his own benefit and concealing his interest in the loan. Concealing the identity of the borrower may or may not have the effect of injuring the lending institution. But the institution ordinarily looks to the borrower for repayment. Here the borrower was actually to become the party in charge of enforcing the loan. The risk to the lender is obvious, and the requisite intent to injure or defraud[31] may be inferred from knowledge of this fact and misrepresentation of it. The risk of injury is similarly apparent when an officer causes a loan to be made for his own benefit through misrepresentation. *Hargreaves* v. *United States*, 75 F.2d 68, 72

[31] The jury was properly told that an essential element of the crime was that the acts constituting "misapplication" had to be done "with intent to injure or defraud the association." The challenged portion of the instruction, part (3), must be read in context with the foregoing language.

(9th Cir.), *cert. denied,* 295 U.S. 759 (1955). Where part of the proceeds of a loan are siphoned to an officer under the pretense that the loan is for construction purposes, as was done here, the officer is guilty of misapplication of the funds of the lending institution. Nor did the elements of the crime charged in count III duplicate the charge in count II. The gravamen of the crime defined in section 1006 is the fraudulent receipt of benefits by an officer in a loan made by his institution; the gravamen of section 657 is the fraudulent conduct of an officer in misapplying the funds of his institution, which may be accomplished by a variety of means, including causing a loan to be made (in which the officer may later participate) under dishonest circumstances. Our discussion on this point answers the argument that the instruction broadened the indictment.[32] The instruction merely defined "misapplication" in light of the evidence presented relating to the charge contained in count II.

The defendants contend that they were deprived of their constitutional right to cross-examine adverse witnesses at the time when such witnesses became "adverse." During the Government's case-in-chief, the testimony of each witness was limited by the court to the defendant or defendants with whom the testimony was directly concerned. Following the direct examination of each witness, counsel for each defendant was given the opportunity to cross-examine. The opportunity was accepted in many instances and declined in others. At the close of the Government's evidence, the court, concluding that a prima facie case of conspiracy had been proved, granted the Government's motion to admit all the evidence against all the

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[32] It should be observed that the defendants did not refer to a broadening of the indictment in their objection to the instruction.

defendants. Each defendant now urges that a right to cross-examine all the witnesses whose testimony had previously been limited to other defendants arose when the motion was granted and that the failure to make these witnesses available for cross-examination at that time was error.

The defendants are mistaken. Their right to cross-examine each Government witness, traditionally and by practical necessity, arose when that witness completed his direct examination. Failure to cross-examine at that time was a waiver of the right to do so. In the trial of a conspiracy case, each witness is offered for a dual purpose: first, to show individual participation in the conspiracy by its various members, and second, to prove the conspiracy itself. Even though the testimony of a witness is temporarily limited to the first purpose, his testimony is nonetheless offered for the second purpose. Defendants' counsel were charged with this knowledge. They deliberately took the risk that the limitation would be removed whenever the Government made a prima facie showing of the existence of a conspiracy.

Defendant Hickey charges that the district court erred in refusing to grant his motion for severance. Hickey was charged as the primary defendant in all three counts. The evidence sustained the charge. Even if Hickey were tried separately, all of the evidence relating to the conspiracy would be admissible against him. The district judge did not abuse his discretion in denying a severance.

We have discussed in detail the principal issues urged for reversal. The defendants have presented a number of other issues. We have considered them and conclude without further discussion that they have no substance.

The judgments of conviction are affirmed.

APPENDIX B

Order of the United States Court of Appeals for the Seventh Circuit entered April 4, 1966:

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

Order of the United States Court of Appeals for the Seventh Circuit entered May 18, 1966:

It Is Ordered by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby, DENIED.

CASTLE, C. J. did not vote on petition for rehearing *en banc*.

APPENDIX D

Order of the United States Supreme Court (per Mr. Justice Tom C. Clark) entered June 14, 1966:

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 15th, 1966.

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234-489—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 345

RALPH T. HICKEY, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–36) is reported at 360 F. 2d 127.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37) was entered on April 4, 1966. A petition for rehearing was denied (*ibid.*) on May 18, 1966. Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to July 15, 1966, and on July 14 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy to misapply and share in loans of a savings and loan association extended be-

yond the transfer of control of the bank by some co-conspirators to others.

2. Whether testimony regarding statements made by some of the conspirators prior to the formation of the conspiracy was properly admitted in evidence against all co-conspirators.

3. Whether the court's instruction on misapplication of bank funds exceeded the scope of the indictment.

4. Whether the trial judge unduly restricted cross examination when he instructed the jury to consider all evidence against all of the defendants at the close of the government's case.

STATEMENT

A three-count indictment charged the five petitioners with wilful misapplication of funds of a federally insured savings and loan association, participation in the proceeds of a loan with intent to defraud the association, and conspiracy to commit the substantive offenses in violation of 18 U.S.C. 371, 657 and 1006. After a jury trial in the United States District Court for the Northern District of Illinois, petitioners Hickey, Frank Graves, and James Graves were found guilty of all three counts. They were sentenced to imprisonment for concurrent five year terms and fined $5,000 on each count. Petitioner Kearns was convicted of the conspiracy count and was sentenced to imprisonment for two years and fined $5,000. Petitioner Heiderscheidt was convicted of conspiracy and fraudulent participation in the funds, and was sentenced to imprisonment for concurrent three year

terms and fined $5,000 on each count (A. 2).[1] The court of appeals affirmed (Pet. App. 37).

The conspiracy count (A. 3–4) alleged that defendant Hickey was an officer of Concord Savings and Loan Association between January 20, 1960 and November 2, 1960; that the defendant Kearns was a director of Concord from November 2, 1960 to October 9, 1961, and that the defendants Graves and Heiderscheidt were directors of Concord from November 2, 1960 to the return of the indictment. It charged them all with a conspiracy to misapply money of Concord and to share unlawfully in approximately $250,000 of the proceeds of specified loans. The overt acts alleged covered the period from January 20, 1960 to July 1963.

The evidence showed that, in January, 1960, petitioner Hickey acquired control and became the managing officer of the Concord Savings and Loan Association, in Chicago (A. 665). The board of directors that Hickey installed at Concord never failed to approve any loan that Hickey recommended (A. 102). In the late spring of 1960, Hickey decided to sell his interest in Concord for $250,000. Milton Price, a realtor and mortgage broker, learned that Hickey was willing to help generate cash for the purchase of his interest by causing Concord to make mortgage loans to the prospective buyer in an amount sufficient to pay for Hickey's interest (A. 46). Price shared office space with Frank and James Graves (father and son) who were real estate developers and with Heiderscheidt (Frank Graves' son-in-law) who was an accountant.

[1] "A." refers to Appellants' Appendix in the court of appeals.

Price told James Graves about Hickey's plans for disposing of Concord.

In July 1960 Price and petitioners James Graves, Frank Graves, Heiderscheidt, and Hickey met at the Concord offices (A. 486). At this and subsequent meetings, agreements were reached pursuant to which the Graveses and Heiderscheidt undertook to line up property to serve as collateral on which Hickey would cause Concord to loan money in an amount sufficient both to acquire the property and to pay Hickey $250,000 for the purchase of Concord by Frank Graves.

Shortly after the July, 1960, meeting, the parties viewed certain parcels of land in order to select property which could be used as collateral for the loan. They first inspected a 142 acre tract, known as the Hartman Farm, over which Frank Graves had come to exercise a substantial measure of control and to which, it was therefore believed, title could be readily obtained.[2] After inspecting Hartman Farm,

[2] The evidence showed that prior to 1960, Hartman Farm had been jointly owned by Hartman and Coquillard. In December, 1959, James and Frank Graves were approached by Coquillard, who offered to sell his one-half interest in the Hartman Farm for $10,000. Preliminary papers were drawn by James Graves at that time (A. 104–106, 465–466). On January 12, 1960, James Graves persuaded Coquillard and Hartman to deed the farm into a trust, naming Coquillard and Hartman as equal beneficiaries with an equal power of direction (A. 108–109). Thereafter James Graves induced Hartman to sign a similar trust agreement naming Hartman and Frank Graves as equal beneficiaries, with the sole power of direction in Frank Graves (A. 109, 134, Govt. Exhibit 2A). Hartman testified that this trust agreement was not completely filled in when he signed it, and that he believed its terms were similar to the first trust agreement,

Hickey expressed the belief that it would not provide sufficient collateral. The Graves group suggested the use of an additional parcel of forty acres of unimproved land known as the Schoolside Subdivision (A. 47, 491–492).

The parties determined that a loan of $350,000 was required to obtain clear title to both the Hartman and Schoolside properties and have enough left to purchase Hickey's interest (A. 498). Loan applications in that amount were fabricated in the name of Wood-Stream Construction Company—unbeknownst to the proprietors of that firm who had no interest in either Hartman Farm or Schoolside (A. 176–179). On August 8, 1960, the board of directors of Concord unanimously approved the loan applications for $295,000 on Hartman Farm and $55,000 on the Schoolside property (A. 41–42, Govt. Exh. 4B). After the loans were approved, efforts were made by the Graveses and Heiderscheidt to obtain a favorable ap-

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except that Frank Graves' name would be substituted for Coquillard (A. 134–135, 156–157). On February 4, 1960, Hartman signed various other documents at James Graves' request. Hartman assigned a 6% share of his interest in the Coquillard-Hartman trust to Frank Graves and agreed that he and Frank Graves would give each other the right of first refusal on their respective interests in the trust (Govt. Exh. 2C, A. 135–137, 148–149). Hartman received $1,500 for the assignment, which James Graves had computed on the basis of an appraisal by A. O. J. Baumann that Hartman Farm was then valued at $85,200 (A. 61, 477–478, Govt. Exh. 23). On February 15, 1960, Coquillard and Hartman realized that the blank documents they had signed had been prepared in such a way as to grant Frank Graves full power over the disposition of Hartman Farm. They sent a letter of protest to the bank which held the trust agreements and ordered the bank not to dispose of the trust res. (A. 109, 120–121, Govt. Exh. 2K).

praisal of Schoolside and Hartman Farm. On August 26, 1960, one appraiser told Frank Graves that his preliminary appraisal placed a value of $71,000 on Hartman Farm and $24,000 on Schoolside. Frank Graves told him not to bother reducing this appraisal to writing (A. 94–95). Three days later a second appraiser, Duffy, set the value of Hartman Farm at between $155,000 and $185,000, and refused a request by James Graves and Heiderscheidt to inflate the valuation to $400,000 (A. 187, 197). James Graves then prevailed upon M. A. Brown to appraise the property as if it were already improved. Brown produced an appraisal of $406,500 on Hartman Farm, as developed, and $70,500 on Schoolside, as improved lots after an expenditure of $50,000 for improvements (A. 808, Govt. Exh. 6, 12). The Brown appraisals were given to Hickey and Concord on September 1, 1960. Hickey, of course, knew that the properties were unimproved. On September 1, Frank Graves executed a $295,000 mortgage on the Hartman Farm and a $55,000 mortgage on Schoolside.

On August 23, 1960, (prior to the receipt of the Duffy appraisal) all of the petitioners except Kearns met with counsel and supplied them with an abbreviated version of the circumstances surrounding the prospective sale of Concord, representing that Duffy had appraised Hartman Farm and Schoolside at $600,000 (A. 654–655, 663–664). The lawyers were not aware that Concord had already approved the $350,000 loan to Wood-Stream Construction Company nor were they later informed of the actual results of Duffy's appraisel (A. 662). Operating on the facts revealed

to them, the lawyers set up a series of escrow agreements. The first provided for receipt of the proceeds of the loans from Concord, and disbursement of the money necessary to obtain title to Hartman Farm and Schoolside. The second escrow was designed to receive and hold the balance of the loan proceeds ($250,000) from the first escrow until control of Concord was transferred from Hickey to Frank Graves. A third escrow was set up in which Kearns placed securities valued at $40,000 to secure the successful completion of the Hickey-Graves contracts. Kearns later became a director of Concord when the Graves group assumed control (A. 727). Between September 29 and November 2, 1960, the $350,000 borrowed from Concord flowed through the escrows as planned, and on November 2, Frank Graves acquired control of Concord, and Hickey received $250,000 (A. 606, 689, Govt. Exh. 4C). At this time Frank Graves, Heiderscheidt, Kearns and Graves' daughter were elected directors of Concord (A. 606).

The fiscal year of Concord ended on September 30, 1960 (A. 613). During the first days of October, while Hickey was still in control and two months after Concord's board had approved the $350,000 loan to Wood-Stream, independent auditors arrived at Concord for their annual inspection. An auditor sent a routine letter to Wood-Stream to verify the loan, and received a negative reply (A. 173, 176, Govt. Exh. 15). Upon learning of this development, the Graves group prevailed upon their attorney to dispatch a letter, dated October 11, to the auditors, stating that his unnamed clients had on September 26, 1960, decided to

substitute Homer C. Fitzgerald, the owner of Shur Construction Company, in place of Wood-Stream as the developer, and that he regretted his delay in transmitting this information to the Concord file (A. 175, Govt. Exh. 30). Accompanying this attorney's letter was Fitzgerald's application for a construction loan. The auditors sent a confirmation letter to Fitzgerald, and received an affirmative reply (A. 173–174). Fitzgerald's reply, together with the attorney's letter and the M. A. Brown appraisal, satisfied the auditors.[3]

Following the audit, Concord's Schoolside and Hartman files underwent a number of changes. The attorney's letter of October 11 was removed, and replaced by a similar letter dated September 15 (A. 174, Def. Exh. 1–2). Another appraisal, which valued the Hartman Farm at $399,000 and Schoolside at $72,500, was placed in the files (Def. Exh. 3, 4).[4]

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[3] As early as July or August, Fitzgerald, who was in some financial difficulties, had been approached by the Graveses and Heiderscheidt with a view toward building on the Hartman Farm. At their request he had signed several documents, some blank. When prepared, these documents purported to reflect a purchase by Fitzgerald of Hartman Farm and Schoolside for $405,000 and an application for a $350,000 construction loan on these properties. Among the documents obtained from Fitzgerald in this manner was a loan-verification letter to the auditors (A. 233–246).

[4] These appraisals set forth values on an individual lot basis. Thus, Hartman Farm was divided into 188 possible lots, of which 132 were valued at $1600 and 36 at $1850, and 20 "lake frontage" lots at $2000 each. 1250 feet of business frontage was value at $65 per foot (A. 965). The appraiser testified that he observed a lake on the farm (A. 417–418, 452). There was no such lake (A. 63). Another expert appraiser testified that this manner of appraisal is "commonly used to inflate the total conclusion to a figure that is unrealistic" (A. 818).

Fitzgerald never added any improvements to the properties (A. 576). In February and March, 1961, Rayka Corporation undertook the development of the land and the payment of the loans (A. 577, 579–580). Rayka had been organized in December, 1960, by nominees of the Graveses; Kearns, a director of Concord, became its president in June 1961 (Govt. Exh. 26, 27). Rayka paid the interest on both loans and the principal on the Schoolside loan; it also received several construction loans from Concord (A. 744). In March, 1963, the principal on the Hartman loan became due, but was not paid. On July 17, 1963, with Heiderscheidt representing Concord and Kearns acting on behalf of Rayka, the time for payment of the principal was extended by 18 months (A. 596).

The FBI began an investigation into Concord's activities in February, 1961 (A. 277). A few days after Frank Graves had been contacted by an FBI agent, the Graveses and Heiderscheidt attempted to induce a bank officer at the American National Bank, trustee of the Schoolside property, to remove certain papers from the Schoolside files (A. 314). When this effort failed, assignments of the beneficial interest in the Schoolside trust were inserted into the trust file purporting to show that Fitzgerald's company had become the beneficial owner of the trust on September 23, 1960, prior to the disbursement of the Concord loan (A. 317–320, Govt. Exh. 3B, 3C, 3A–8, 3A–9). In 1962, when Hickey learned that an FBI agent had contacted Fitzgerald, he arranged a meeting, which was attended by James Graves, Kearns, Hickey, and Fitzgerald, during which Fitzgerald was offered all

the mortgage money he needed if he would "take the Fifth Amendment" (A. 211–212, 227, 267).

ARGUMENT

1. Petitioners argue (Pet. 15–22) that the conspiracy to misapply funds of Concord came to an end on November 2, 1960, when control of Concord was transferred from Hickey to the Graves group, so that it was error to admit against all petitioners evidence of events occurring after that date. This obviously was not the theory of the indictment, which alleged a conspiracy continuing from January 1960 until the return of the indictment and 15 overt acts in furtherance of the conspiracy between 1960 and 1963 (A. 3–5). The indictment thus clearly charged, as within the conspiracy to misapply and participate in funds of Concord, acts of the Graves group occurring after the 1960 transfer of control. Contrary to petitioners' suggestion, the indictment did not allege "a subsidiary conspiracy to conceal" continuing "after the central criminal purposes of a conspiracy have been attained" (*Grunewald* v. *United States*, 353 U.S. 391, 401–402). Nor did the trial judge charge the jury with respect to a subsidiary conspiracy (A. 888–898) (compare *Forman* v. *United States*, 361 U.S. 416). The theory of the indictment—and the theory on which the case was submitted to the jury—was that the conspiracy to misapply Concord's funds persisted for so long as the fraudulently procured and inadequately secured loans were outstanding. This theory, as the court of appeals recognized (Pet. App. 27), was amply supported by the evidence.

While Hickey was in control of Concord and a subservient board of directors interposed no restraint on his management of its affairs, the mere obtaining of funds from Concord hardly presented a challenge. The conspiracy was born of a shared desire to obtain Concord's funds by a scheme of devices that would cloak the unlawful misapplication and participation with an appearance of legitimacy. The conspiracy contemplated from the outset that the tracts, offered as collateral for the loans, would be subdivided and developed so that the large debt to Concord could be retired by the repayment of smaller individual loans, which would be assumed by prospective home buyers. Since the method of inflating the collateral was to get appraisals based on the prospective development of vacant land, some effort at development was obviously essential if the scheme was to succeed. Thus, such acts as the formation of Rayka in 1961 when Fitzgerald proved unable to develop Hartman Farm and the obtaining of an extension to permit more time for the repayment of the loans were clearly in furtherance of the conspiracy charged.

The investigation by the FBI, which commenced in 1961 while the development of the collateral was still in progress, evoked from the conspirators more strenuous efforts to preserve appearances, but did not alter the fundamentals of the plan. Indeed, the response to the FBI investigation—the attempts to alter files and to quiet Fitzgerald—was quite similar to the earlier, and more successful, effort to cope with the auditors whose random loan-verification letter of October 1960 had disclosed Wood-Stream's non-participa-

tion. In sum, the various measures in which each of the conspirators engaged in 1961 and 1962 were merely adaptations of the on-going plan to the exigencies of the situation. This case is thus not like those on which petitioners rely (*Krulewitch* v. *United States,* 336 U.S. 440, *Lutwak* v. *United States,* 344 U.S. 604, and *Grunewald* v. *United States,* 353 U.S. 391) which hold that a subsidiary conspiracy to conceal may not be inferred from evidence that the original conspiracy was kept secret and the conspirators took care to cover up their crime to escape detection. The acts here involved did not occur after the conspiracy had ended, but while it was going on.[5] The fact that the particular method of covering was not within the contemplation of the parties when they first laid their plans does not render their acts outside the scope of the conspiracy so long as the basic conspiracy was still in existence. Acts of concealment in furtherance of the main criminal objective are admissible evidence. *Grunewald* v. *United States,* 353 U.S. at 405; *Forman* v. *United States,* 361 U.S. 416; *United States* v. *Klein,* 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924; *Mount* v. *United States,* 333 F. 2d 39 (C.A. 5), certiorari denied, 379 U.S. 900.[6]

[5] There was here no reliance on acts of concealment to extend the statute of limitations. The indictment was returned well within the applicable period even if the conspiracy had ended—as it did not—on November 2, 1960.

[6] Petitioners' objections to the admission of other post-1960 evidence (see Pet. 10) are ill-founded. The evidence as to a lawsuit by Coquillard against Graves was introduced by the defense (A. 126–127) and was mentioned by the government only on redirect (A. 129–130). Fitzgerald's testimony that he was suing Graves also came in on redirect (A. 268–271) after

Petitioners also argue that, on the government's theory that the conspiracy continued after the transfer of control in November, 1960, it was error to exclude evidence of repayment of the loans by which the transfer of control over Concord was effected. Testimony by Frank Graves that Rayka paid the Schoolside loan was admitted without objection (A. 580). The repayment of the Hartman Farm loan, however, was alleged to have occurred in September, 1964, after indictment and on the eve of trial, *i.e.*, long after the conspiracy charged in the indictment. The trial judge heard evidence outside the presence of the jury that this loan was written off in September, 1964, when Concord merged with another savings and loan association (A. 772–773). Under the circumstances, he properly ruled the evidence inadmissible for, not only did it occur after indictment, but the manner in which that loan was retired would have raised collateral issues in a case already complicated by the devious methods used by petitioners to effectuate their scheme.

2. Petitioners contend (Pet. 23–25) that it was error to admit, as against all defendants, testimony regarding conversations which took place before Hickey met the Graves group. In particular they object to the testimony concerning the steps by which Frank Graves acquired a measure of control over

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the defense counsel had brought out that Fitzgerald had talked to an attorney, Lasswell, who was involved in other litigation against Graves (A. 222–223, 238, 242). Fitzgerald had given Lasswell documents when he retained him to sue Graves (A. 247). Thus it was petitioners themselves who brought the civil litigation into the case.

Hartman Farm—concededly, prior to the commencement of the conspiracy. Petitioners' argument misconstrues the function of such evidence in this case. None of the testimony objected to was introduced to prove the truth of the matter stated, but merely served as background material essential to set the stage for the conspirators to effect their plan (A. 12–13). Without that background, many of the events occurring after the conspiracy was under way would be wholly unintelligible. The pre-June 1960 evidence served to explain the ability of Frank Graves to offer the Hartman Farm as collateral for the loan from Concord. The tenuousness of the control which Graves could exercise over the farm materially affected the security which Concord obtained by taking a mortgage on the property. The evidence also served to refute later testimony regarding the valuation placed upon the collateral by the conspirators. In short, the conspiracy was inextricably entwined in, and inexplicable without, the history of the acquisition of the collateral. See *United States* v. *Postma,* 242 F. 2d 488 (C.A. 2), certiorari denied, 354 U.S. 922; *United States* v. *Mesarosh,* 223 F. 2d 449, 454–455 (C.A. 3), reversed on other grounds, 352 U.S. 1; *United States* v. *Dennis,* 183 F. 2d 201, 231 (C.A. 2), affirmed, 341 U.S. 494.

3. The claim, raised for the first time on appeal (see Pet. App. 35, n. 32), that the trial judge erred in its instruction concerning count 2 of the indictment (Pet. 25–28) affects only the fines of the three petitioners convicted on that count, since the prison

sentences are concurrent.[7] It is, in any event, without merit. The indictment charged in count 2 (A. 5–6) that Hickey directly, and the others as aiders and abettors, misapplied the funds of Concord with intent to defraud Concord, in that Hickey, "by reason of his position and by virtue of the power" he had over Concord, fraudulently caused the approval of the designated loans "well knowing" that Concord "did not receive sufficient collateral to secure" them. This language manifestly put the defendants on notice that Hickey was being charged with procuring the designated loans in a fraudulent manner through the use of his authority and control. As the court below held (Pet. App. 32–35) the instruction on what acts constitute a wilful misapplication did not enlarge the substantive charge of the indictment, but properly served as an explanation of a statutory term in light of the evidence presented. See *United States* v. *Alaimo,* 297 F. 2d 604, 606–607 (C.A. 3), certiorari denied, 369 U.S. 817; *United States* v. *Bernard,* 287 F. 2d 715 (C.A. 7), certiorari denied, 366 U.S. 961.

4. Petitioners contend that they were denied an opportunity to cross-examine government witnesses whose testimony, initially offered against one or more of the defendants, was held applicable to all of them when the trial judge was satisfied that there was sufficient evidence to connect all of them with the conspiracy (A. 345). The government's request at the

[7] Contrary to petitioners' contention (Pet. 27–28), the language of count 1, charging in part a conspiracy to wilfully misapply, is broad enough to encompass any of the means of misapplication as defined by the judge (A. 3–4, 898–899). Misapplication is not an element of the third count (A. 900).

close of its case that the court instruct the jury that all of the evidence in the record be regarded as applicable to all of the defendants was hardly out of the ordinary. Counsel for Frank Graves and Heiderscheidt acknowledged that "it certainly does not come as a surprise to us that the government makes this motion at this time" (A. 326). Nevertheless counsel for Hickey objected that "to now inform the jury that evidence which was admitted in a restricted fashion may now be considered against all of the defendants is to deprive the defendant Hickey of his right of cross-examination", (A. 335). That objection was completely answered by the trial judge (A. 339):

> The Court: * * * These lawyers were all given the fullest opportunity for cross examination. Furthermore, the lawyers availed themselves of the opportunity and I agree that Mr. Callaghan [Hickey's counsel] availed himself of it most extensively.

Accordingly, the court properly instructed the jury as follows (A. 345):

> The Court: Ladies and gentlemen of the jury, I instruct you that all the evidence which you have heard and or seen, given through the witnesses here will now be considered by you as to all of the defendants.

The procedure adopted by this court is not novel. See *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), 340 F. 2d 254 (C.A. 7), certiorari denied, 381 U.S. 911; *United States* v. *Baxa*, 340 F. 2d 259 (C.A. 7), reversed on other grounds, 381 U.S. 353. See also *United States* v. *Dennis*, 183 F. 2d 201, 230–231 (C.A.

2), affirmed, 341 U.S. 494. Defense counsel, no strangers to the trial arena, were aware of the requirement that the conspiracy had to be proved before testimony initially admitted as to less than all of the co-conspirators could be considered against the remaining defendants. They were also aware of the practice of limiting testimony to particular persons named until the existence of a conspiracy is established. As noted by the trial judge and the court of appeals (Pet. App. 35), each defense counsel cross-examined several witnesses whose testimony was not applicable to his client when offered. For example, the court limited Coquillard's testimony to Frank and James Graves, yet Coquillard was cross-examined by counsel for all of the defendants (A. 103–132). Counsel for Hickey examined witness Duffy extensively, although his testimony was originally limited to James and Frank Graves and Heiderscheidt (A. 190). Kearns' counsel examined witness Squires whose testimony was originally applicable only to Hickey, Frank and James Graves (A. 289, 300). The court did not restrict cross-examination by any counsel at the time the witnesses testified. Even if the argument of counsel regarding the motion to instruct the jury to consider all testimony against all witnesses can be interpreted as containing a motion by defense counsel to re-open cross-examination, the court did not abuse its discretion in rendering its ruling that counsel had already had sufficient opportunity to examine the witnesses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondents.

PETITIONERS' REPLY

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PETITIONERS' REPLY

I.

THE CONSPIRACY CHARGED AND PROVED TERMINATED IN 1960.

[Reply to Sol. Gen.'s Br., pp. 10-13.]

The Solicitor General concedes by implication that if petitioners are correct that the conspiracy as charged and proved ended in 1960, it was error for the trial court to admit as against all petitioners evidence of conversations between some of them which took place after 1960. The Court of Appeals also conceded this point. (App. 24.)

The Solicitor General, however, contends that the indictment in this case ". . . clearly charged, as within the conspiracy to misapply and participate in funds of Concord, acts of the Graves group occurring after the 1960 transfer of control." (Br., p. 10.)

The language of the indictment is a complete rebuttal to this inadvertent misstatement of the record. The indictment states that all of the defendants-petitioners conspired ". . . to defraud the Concord Savings and Loan Association . . . by having [all of the defendants] . . . willfully misapply money, funds and credits belonging to and entrusted to Concord Savings & Loan Association, and unlawfully and willfully participate, share in and indirectly receive moneys in the amount of approximately $250,000, which money represented a portion of the proceeds of Concord Savings & Loan Association loans numbered 4275 and 4276, ..." (A. 3-4.)

The accomplishment of the twofold objective of the conspiracy as charged constitutes the substantive allegations contained in Counts II and III of the indictment. Count II specifies that the willful misapplication involved the making of loans numbers 4275 and 4276 by Concord without receiving "sufficient collateral to secure the said alleged mortgage loans." (A. 6.) Count III is equally specific in stating that the unlawful participation involved the improper receipt by the defendants of the proceeds of loans 4275 and 4276. (A. 7-8.)

Both the crimes of willful misapplication and fraudulent participation as charged were complete on or about November 2, 1960. *The indictment does not allege that concealment of the misapplication and participation was a part of the original conspiracy, nor does it allege that concealment constituted an objective of a subsidiary conspiracy.* (See Sol. Gen's. Br., p. 10.)

The trial court, based upon inference arising from acts of covering up taking place after 1960, assumed the existence of an *uncharged,* subsidiary conspiracy to conceal the accomplishment of the central objective of the conspiracy charged in Count I of the indictment. Based upon this assumption, *the trial court erroneously instructed the jury to consider all post-1960 conversations against all defendants, whether participants or not.*

There was no evidence produced that the acts of covering up constituted part of the original plan. In fact, as the Solicitor General points out (Br., p. 11) it was the commencement of the F.B.I.'s investigation in 1961 which gave rise to efforts to "preserve appearances"—to cover up.

The process of inference and assumption employed by the trial court, and condoned by the Solicitor General, is precisely what this Court condemned in *Krulewitch* v. *U. S.* 336 U.S. 440, 443-444 (1949) and *Grunewald* v. *U. S.,* 353 U.S. 391, 401-402 (1957).

The Solicitor General begs the question raised by petitioners when he argues (Br., p. 12):

> "The fact that the particular method of covering was not within the contemplation of the parties when they first laid their plans does not render their acts outside the scope of the conspiracy *so long as the basis conspiracy was still in existence. Acts of concealment in furtherance of the main criminal objective are admissible evidence.*" (Emphasis added.)

The conversations here complained of took place *after* the conspiracy as charged had ended in the attainment of the central criminal objective, and not in furtherance of it.

The cases cited by the Solicitor General do not support the action of the trial court. The *Grunewald* case unequivocally supports petitioners' position (See Pet., pp. 15-

16, 19-21); and in the *Forman* and *Klein* cases the indictments expressly alleged that an objective of the conspiracy was concealment.

In *Mount* v. *U. S.*, 333 F.2d 39 (5th Cir. 1964) cert. denied 379 U.S. 900 (Sol. Gen's. Br., p. 12), the indictment alleged that the defendants agreed to counterfeit federal reserve notes and that they further agreed to " . . . buy. sell, transfer, receive and deliver counterfeit $100 federal reserve notes with the intent that they be passed, published, and used as genuine . . . " (333 F.2d at 40.) The Court of Appeals approved the admission of certain conversations as against non-participants (333 F.2d at 44):

> "The theory of appellants is that the conspiracy ended with the direction in the telephone conversation between Ellis and Ainsworth that the counterfeit money be burned, and that this telephone conversation as well as the subsequent conversations between Mount and Ellis were related to a separate conspiracy to destroy the counterfeit money, and thus were inadmissible in connection with the conspiracy charged. The long and the short of this stock argument is that these conversations all had to do with the conspiracy charged. The money was still in existence; trouble was near at hand, and care was being taken to avoid detection."

The *Mount* case is distinguishable from the case at bar because in *Mount* the conceded objective of the conspiracy as charged—the passing of the counterfeit notes with the intent that they be used as genuine—had not been fully achieved at the time of the conversations complained of by the appellants. In the instant case the central objective of the conspiracy as charged—the making of two inadequately secured loans and the unlawful participation in the proceeds thereof—was completely achieved in 1960.

To the extent that the *Mount* case is not distinguishable, it is directly inconsistent with the holding of this Court

in the *Grunewald* and *Krulewitch* cases (see Pet. pp. 21-22), and demonstrates the need for an exercise of this Court's discretionary review.

II.

THE ADMISSIONS OF PRE-CONSPIRACY CONVERSATIONS AS AGAINST NON-PARTICIPANTS VIOLATED THE RULE AGAINST ADMISSION OF HEARSAY EVIDENCE.

[Reply to Sol. Gen.'s Br., pp. 13-14]

The Solicitor General concedes that the conversations involved in the steps taken by Frank Graves to acquire Hartman Estates, took place prior to the commencement of the conspiracy. (Br., pp. 13-14.) It is argued, however, that evidence of these conversations was relevant and not in the nature of hearsay: "None of the testimony objected to was introduced to prove the truth of the matters stated, but merely served as background material essential to set the stage for the conspirators to effect their plan . . . ." (Br., p. 14.)

This is *the first time* that it has been argued by the government that the pre-conspiracy conversations were not in fact hearsay because not introduced to prove the truth of the matters stated. The argument is contradicted by the representations of the United States Attorney who sought the introduction of the evidence, and the Solicitor General's own brief (at p. 14). The evidence in question was introduced to prove the truth of the matters stated therein, namely, "The tenuousness of the control which Graves could exercise over the farm" and the "valuation placed upon the collateral" by the Graveses. (Sol. Gen's. Br., p. 14.)

Although it was unnecessary to place these prejudicial conversations before the jury for consideration as against

the participants (the same points could have been proved through documents), the admission of hearsay evidence as against non-participants clearly violated the principles announced by this Court and the holdings of various Courts of Appeals.

The three cases cited by the Solicitor General (Br., p. 14) support rather than contradict petitioners' argument:

(1) In *United States* v. *Postma*, 242 F. 2d 488 (2d Cir. 1957), the trial judge properly limited the pre-conspiracy evidence to the defendant involved, and did *not* admit the testimony as to defendants who later joined the conspiracy. (See 242 F.2d at 497.) That is the rule for which petitioners contend in this case.

(2) In *United States* v. *Dennis*, 183 F.2d 201 (2d Cir. 1950), aff'd on other grounds, 341 U.S. 494, the court concluded that late entrants into a conspiracy are held to adopt declarations of co-conspirators *which occurred during the existence of the conspiracy*. This conclusion assumes rather than decides the issue for which it is cited by the Solicitor General. That is, the conversations in the *Dennis* case took place during the existence of the conspiracy, whereas, in the case at bar, the conversations admittedly took place prior to the inception of the conspiracy charged.

(3) Similarly, in *United States* v. *Mesarosh*, 223 F.2d 449 (3rd Cir. 1955), the declarations admitted against non-participants were made *during the existence of the conspiracy* (223 F.2d at 455):

> "These acts and declarations which occurred before some of the appellants became members of the Party were admissible because when one joins an existing conspiracy knowing of the illegal objectives, he takes the conspiracy as it is, including prior acts and declarations by co-conspirators which are competent as evidence against him."

III.

THE TRIAL COURT IN DEFINING THE CHARGE OF MISAPPLICATION VIOLATED THE PRINCIPLES ESTABLISHED BY THIS COURT IN STIRONE V. U.S., 361 U.S. 212 (1960).

[Reply to Sol. Gen.'s Br., pp. 14 to 15.]

Contrary to Solicitor General's assertion (Br., p. 14), petitioners objected to the trial court's proposed instruction as to the meaning of "misapplication" charged in the indictment on the ground (inter alia) that neither concealment nor the making of a loan to a fictitious borrower were charged in the indictment. (A. 885-886.) This objection was overruled and was thereafter urged as error on appeal.

Petitioner's have previously demonstrated how this fundamental error infects the entire jury verdict. (Pet., pp. 27-28.)

The Solicitor General contends that the instruction served as an "explanaiton of a statutory term in light of the evidence presented." (Sol. Gen's. Br., p. 15.) This argument misconstrues the function of an indictment in a Section 657 case. A charge in the language of Section 657 is insufficient because the statutory terms contained therein have no settled technical meaning. The indictment in a Section 657 case must state how the alleged misapplication was accomplished; and that statement is binding upon the government. *U.S.* v. *Britton*, 107 U.S. 655, 669 (1882).

The indictment in the case at bar specifies that the misapplication consisted in defendant Hickey's making two specified loans, well-knowing that the association "did not receive sufficient collateral to secure" the loans. The trial court nevertheless directed the jury that, even if they failed to believe beyond a reasonable doubt that the two

loans had been made without sufficient security, they could nevertheless find defendants guilty of misapplication if they believed the two loans to have been concealed or made to a fictitious borrower.

Because of this direction, it is not now possible to determine conclusively whether or not the defendants were convicted on the charges which the grand jury specified in Count II of the indictment. This is precisely the situation which faced this Court in the *Stirone* case. As observed in *Stirone,* this uncertainty is violative of petitioners' Fifth Amendment right that the prosecution as begun by an indictment. (361 U.S. at 217, 219.)

IV.

PETITIONERS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST THEM.

[Reply to Sol. Gen.'s Br., pp. 15-17.]

The Solicitor General has apparently micsonstrued petitioners' argument with respect to the right to cross-examination because in his brief in opposition he argues that since counsel for various defendants were afforded the opportunity to cross-examine all witnesses, whether or not the witnesses were testifying against their clients, it was purely a matter of discretion for the trial court whether or not counsel for defendants were to be permitted to cross-examine witnesses who did testify against their clients at the point in time when the witnesses became adverse to their clients. (Sol. Gen's. Br., p. 17.)

Petitioners contend, to the contrary, that cross-examination of government witnesses when those witnesses tes-

tified against particular defendants was a matter of constitutional right, and not a plea directed to the discretion of the trial court.

This Court has recently had occasion to reaffirm the absolute quality of the rights conferred by the Sixth Amendment in *Brookhart* v. *Janis*, 86 Sup. Ct. 1245 (1966), and *Pointer* v. *Texas*, 380 U.S. 400 (1965).

The fact that the procedure employed in this case may have become a practice in the Seventh Judicial Circuit in no way detracts from the clear violation of constitutional rights involved.

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